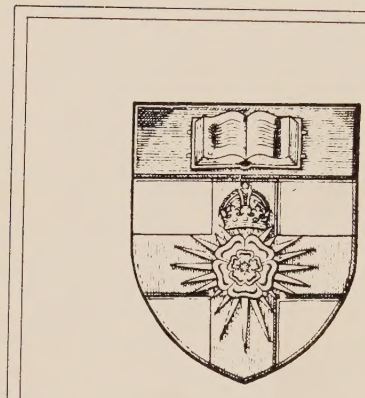
THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY

REFERENCE ONLY

364.4
Mx North
Reference Only



UNIVERSITY OF LONDON
LIBRARY

Digitized by the Internet Archive
in 2026

https://archive.org/details/law-reports-chancery-division_1909_2

THE

INCORPORATED COUNCIL OF LAW REPORTING

FOR

ENGLAND AND WALES.

Members of the Council.

Chairman—Sir F. A. Bosanquet, K.C.
Vice-Chairman—Robert F. Norton, Esq., K.C.

EX-OFFICIO MEMBERS.

Sir William S. Robson, M.P. . . Attorney-General.
Sir Samuel T. Evans, M.P. . . Solicitor-General.
William H. Winterbotham, Esq., President of the Law Society.

ELECTED MEMBERS.

P. Ogden Lawrence, Esq., K.C. A. R. Kirby, Esq.	Lincoln's Inn.
Sir F. A. Bosanquet, K.C. J. Eldon Bankes, Esq., K.C.	Inner Temple.
J. M. Astbury, Esq., K.C., M.P. C. C. Scott, Esq.	Middle Temple.
J. C. Lewis Coward, Esq., K.C. H. E. Duke, Esq., K.C.	Gray's Inn.
W. English Harrison, Esq., K.C., of the Middle Temple. Robert F. Norton, Esq., K.C., of Lincoln's Inn.	Appointed by the Council of Law Reporting on the nomination of the General Council of the Bar.
Sir John Hollams (Firm — Messrs. Hollams, Sons, Coward & Hawksley). W. Melmoth Walters, Esq. (Firm—Messrs. Walters & Co.).	The Law Society.

Secretary—P. Noble Fawcett, Esq., 10, Old Square, Lincoln's Inn, London, W.C.

1909.

THE

LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

Supreme Court of Judicature.

CASES DETERMINED IN THE

CHANCERY DIVISION

AND IN

LUNACY,

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

EDITOR—SIR FREDERICK POLLOCK, BART., *Barrister-at-Law.*
ASSISTANT EDITOR—A. P. STONE, *Barrister-at-Law.*

REPORTERS.

Court of Appeal	W. COWELL DAVIES, H. B. HEMMING,	*Barristers-at-Law.*
Mr. Justice Joyce AND Mr. Justice Eve	G. A. STREETEN, R. MORRISON, GEORGE MACAN,	*Barristers-at-Law.*
Mr. Justice Swinfen Eady AND Mr. Justice Neville	H. L. FRASER, G. R. ALSTON, J. R. BROOKE,	*Barristers-at-Law.*
Mr. Justice Warrington AND Mr. Justice Parker	FRANK EVANS, H. C. ROPER, W. IVIMEY COOK,	*Barristers-at-Law.*

1909.—VOL. II.

LONDON:

Printed for the Council of Law Reporting

BY BRADBURY, AGNEW, & CO. LD., OF 10, BOUVERIE STREET, E.C.,

And Published

BY THE COUNCIL AT 10, OLD SQUARE, LINCOLN'S INN, W.C.

BIBL. LONDIN UNIV.

BIBL.
LONDIN.
UNIV.

Lord Loreburn	*Lord Chancellor.*
Lord Alverstone	*Lord Chief Justice of England.*
Sir H. H. Cozens-Hardy	*Master of the Rolls.*
Sir John Charles Bigham	*President of the Probate, Divorce, and Admiralty Division.*
Sir Roland Vaughan Williams Sir J. Fletcher Moulton Sir George Farwell Sir H. B. Buckley Sir W. R. Kennedy	*Lords Justices of the Court of Appeal.*
Sir Matthew I. Joyce Sir C. Swinfen Eady Sir T. Rolls Warrington Sir R. Neville Sir R. J. Parker Sir H. T. Eve	*Justices of High Court, attached to Chancery Division.*
Sir William S. Robson	*Attorney-General.*
Sir Samuel T. Evans	*Solicitor-General.*

The Mode of Citation of the Volumes of the *Law Reports*, commencing January 1, 1909, will be as follows :—

In the First Series,
[1909] 1 Ch. [1909] 2 Ch.

In the Second Series,
[1909] 1 K. B. [1909] 2 K. B. [1909] P.

In the Third Series,
[1909] A. C.

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

A.

	PAGE
Accrington Corporation Steam Tramways Company, *In re* –	40
Amherst (Lord), Fountaine *v.* *In re* Fountaine. *In re* Dowler – – (C.A.)	382
Armstrong, Bevir *v.* *In re* Illingworth – – –	297
Ascherson *v.* Tredegar Dry Dock and Wharf Company –	401
Attorney-General, Fowler *v.* *In re* University of London Medical Sciences Institute Fund – – (C.A.)	1
——— *v.* George C. Smith, Ld. – – – –	524
——— *v.* Gibb –	265
——— *v.* Grand Junction Canal Company –	505
Attorney-General *v.* West Gloucestershire Water Company (C.A.)	338

B.

Bank of Africa, Ld. *v.* Cohen (C.A.)	129
Barnes, Reynolds *v.* – –	361
Barrow *v.* Paringa Mines (1909), Ld. – – – –	658
Bedsteads' (Whitfields) Application, *In re* – – – –	373
Bellerby *v.* Heyworth (C.A.)	23
Bentley's Yorkshire Breweries, Ld., *In re* – – – –	609
Bevir *v.* Armstrong. *In re* Illingworth – – –	297
Bickerstaff, Reid *v.* – (C.A.)	305

	PAGE
Blackburn *v.* Parbola, Ld. *In re* Parbola, Ld. – – –	437
Blair *v.* Maidstone Palace of Varieties, Ld. *In re* Maidstone Palace of Varieties, Ld.	283
Braulik, *Ex parte*. *In re* Bremer's Patent – – –	217
———, *Ex parte*. *In re* Högner's Patent– – –	217
Bremer's Patent, *In re*. *Ex parte* Braulik – – – –	217
Brockman, *In re* – (C.A.)	170
Brooks *v.* Muckleston – –	519
Butter (United) Companies of France, Ld., Thomas *v.* –	484

C.

California Fig Syrup Company's Application, *In re* – –	99
Canal (Grand Junction) Company, Attorney-General *v.* –	505
Canning (Gordon), Taff Vale Railway Company *v.* – –	48
Carpalla United China Clay Company, Great Western Railway Company *v.* (No. 2) –	471
Cattle and Land (Espuela) Company, *In re* – – –	187
Chesham (Lady), Valentia (Viscount) *v.* *In re* Lord Chesham's Settlement– (C.A.)	329
Chesham's (Lord) Settlement, *In re*. Viscount Valentia *v.* Lady Chesham – – (C.A.)	329
China Clay (Carpalla United) Company, Great Western Railway Company *v.* (No. 2)	471
Churchill, *In re*. Hiscock *v.* Lodder – – – –	431
Clibborn *v.* O'Brien. *In re* Friends' Free School – –	675
Coats *v.* Herefordshire County Council – – (C.A.)	579
Cohen, Bank of Africa, Ld. *v.* (C.A.)	129
Cook *v.* Frederick. *In re* Nash	450
Cope *v.* Crossingham (C.A.)	148
Craster *v.* Thomas – – –	348
Crossingham, Cope *v.* (C.A.)	148
Cuthbert *v.* Robarts, Lubbock & Co. – – – (C.A.)	226

D.

Dale, Hulbert *v.* – (C.A.)	570
Defries (J.) & Sons, Ld., *In re*. Eichholz *v.* J. Defries & Sons, Ld. – – – – –	423
Dering, Nottidge *v.*– – –	647
———, Raban *v.* – – –	647
Donald, *In re*. Moore *v.* Somerset – – – – –	410
Dowler, *In re*. *In re* Fountaine. Fountaine *v.* Amherst (Lord) (C.A.)	382
Dry Dock and Wharf (Tredegar) Company, Ascherson *v.*– –	401
Dunbar *v.* Dunbar – – –	639

E.

Eade *v.* Nicholson. *In re* Nicholson – – – – –	111
East Barnet Valley Urban Council *v.* Stallard – (C.A.)	555
Eichholz *v.* J. Defries & Sons, Ld. *In re* J. Defries & Sons, Ld. – – – – –	423
Espuela Land and Cattle Company, *In re* – – –	187

F.

Fig Syrup (California) Company's Application. *In re* –	99
Fountaine, *In re*. *In re* Dowler. Fountaine *v.* Amherst (Lord) (C.A.)	382
———— *v.* Amherst (Lord). *In re* Fountaine. *In re* Dowler – – (C.A.)	382
Fowler *v.* Attorney-General. *In re* University of London Medical Sciences Institute Fund (C.A.)	1
Frederick, Cook *v.* *In re* Nash–	450
French, Williamson *v.* *In re* Mair– – – – –	280

PAGE

Friends' Free School, *In re.* Clibborn *v.* O'Brien – – 675

G.

Gas Light and Coke (Kent County) Company, *In re* – 195
Gas (South Suburban) Company *v.* Metropolitan Water Board – 666
George C. Smith, Ld., Attorney-General *v.* – – – – 524
Gibb, Attorney-General *v.* – 265
Gibbes *v.* Hale-Hinton. *In re* Hilton – – – – 548
Gloucestershire (West) Water Company, Attorney-General *v.* (C.A.) 338
Gordon Canning, Taff Vale Railway Company *v.* – – – 48
Grand Junction Canal Company, Attorney-General *v.* – – 505
Great Western Railway Company *v.* Carpalla United China Clay Company (No. 2) – – 471
Gutta Percha and India Rubber Company of Toronto's Applitions, *In re* – – (C.A.) 10

H.

H.'s Settlement, *In re.* H. *v.* H. 260
Hale-Hinton, Gibbes *v.* *In re* Hilton – – – – 548
Hambrough *v.* Hambrough. *In re* Hambrough's Estate – – 620
Hambrough's Estate, *In re.* Hambrough *v.* Hambrough – 620
Harris, *In re.* Leacroft *v.* Harris – – – – 206
———, Leacroft *v.* *In re* Harris 206
Hatschek's Patents, *In re.* *Ex parte* Zerenner – – 68
Hemsley, Powell *v.* – (C.A.) 252
Herefordshire County Council, Coats *v.* – – (C.A.) 579
Heyworth, Bellerby *v.* (C.A.) 23
Hill *v.* Withall. *In re* Rawlinson 36
Hilton, *In re.* Gibbes *v.* Hale-Hinton – – – – 548
Hiscock *v.* Lodder. *In re* Churchill – – – – 431

PAGE

Högner's Patent, *In re.* *Ex parte* Braulik – – – – 217
Holford, Salaman *v.* – – 64
———, ——— *v.* (C.A.) 602
Howarth, *In re.* Howarth *v.* Makinson – – (C.A.) 19
——— *v.* Makinson. *In re* Howarth – – (C.A.) 19
Hulbert *v.* Dale – (C.A.) 570

I.

Illingworth, *In re.* Bevir *v.* Armstrong – – – – 297
India Rubber (Gutta Percha and) Company of Toronto's Applications, *In re* (C.A.) 10

J.

J. Defries & Sons, Ld., *In re.* Eichholz *v.* J. Defries & Sons, Ld. – – – – – 423
James Jones & Sons, Ld. *v.* Tankerville (Earl) – – 440
Jones (James) & Sons, Ld. *v.* Tankerville (Earl) – – 440

K.

Kent County Gas Light and Coke Company, *In re* – – 195

L.

Land and Cattle (Espuela) Company, *In re* – – 187
Las Casas and Norton's Contract, *In re* – – – – 59
Leacroft *v.* Harris. *In re* Harris – – – – 206
Lodder, Hiscock *v.* *In re* Churchill – – – – 431
London (University of) Medical Sciences Institute Fund, *In re.* Fowler *v.* Attorney-General (C.A.) 1
Louisiana and Southern States Real Estate and Mortgage Company, *In re* – – – 552

M.

PAGE

Maidstone Palace of Varieties, Ld., *In re.* Blair *v.* Maidstone Palace of Varieties, Ld.– 283
———————————, Blair *v. In re* Maidstone Palace of Varieties, Ld. – – – 283
Mair, *In re.* Williamson *v.* French – – – – 280
Makinson, Howarth *v. In re* Howarth – – (C.A.) 19
Medical (University of London) Sciences Institute Fund, *In re.* Fowler *v.* Attorney-General (C.A.) 1
Metropolitan Water Board, South Suburban Gas Company *v.* – 666
Moore *v.* Somerset. *In re* Donald – – – – 410
Muckleston, Brooks *v.* – – 519

N.

Nash, *In re.* Cook *v.* Frederick 450
Nicholson, *In re.* Eade *v.* Nicholson – – – – 111
———, Eade *v. In re* Nicholson – – – – 111
Norton and Las Casas' Contract, *In re* – – – – 59
Nottidge *v.* Dering – – – 647

O.

O'Brien, Clibborn *v. In re* Friends' Free School – – 675
Ochs *v.* Ochs Brothers – – 121
Ochs Brothers, Ochs *v.* – – 121

P.

Parbola, Ld., *In re.* Blackburn *v.* Parbola, Ld. – – – 437
———, Blackburn *v. In re* Parbola, Ld. – – – 437
Paringa Mines (1909), Ld., Barrow *v.* – – – – 658
Pearce, *In re* – – (C.A.) 492
Peckham, Dulwich and Crystal Palace Tramways Bill, *In re* – 540
Peterson, *In re* – (C.A.) 398

PAGE

Poole *v.* Riversdale. *In re* Stawell's Trusts – (C.A.) 239
Powell *v.* Hemsley – (C.A.) 252

R.

Raban *v.* Dering – – – 647
Rawlinson, *In re.* Hill *v.* Withall – – – – – 36
Real Estate and Mortgage (Louisiana and Southern States) Company, *In re* – 552
Reid *v.* Bickerstaff – (C.A.) 305
Reynolds *v.* Barnes – – – 361
Riversdale, Poole *v. In re* Stawell's Trusts – (C.A.) 239
Robarts, Lubbock & Co., Cuthbert *v.* – – (C.A.) 226
Roberts, West *v. In re* West – 180

S.

Salaman *v.* Holford – – – 64
——— *v.* ——— – – (C.A.) 602
Share Purchase (United Service) Society, *In re* – – – 526
Smith (George C.), Ld., Attorney-General *v.* – – – – 524
Somerset, Moore *v. In re* Donald 410
South Suburban Gas Company *v.* Metropolitan Water Board – 666
Southern States (Louisiana and) Real Estate and Mortgage Company, *In re* – – – 552
Stallard, East Barnet Valley Urban Council *v.* – (C.A.) 555
Stawell's Trusts, *In re.* Poole *v.* Riversdale – – (C.A.) 239
Steam Tramways (Accrington Corporation) Company, *In re* – 40
Sykes, *In re.* Sykes *v.* Sykes (C.A.) 241
——— *v.* Sykes. *In re* Sykes (C.A.) 241

T.

Taff Vale Railway Company *v.* Gordon Canning – – – 48
Tankerville (Earl), James Jones & Sons, Ld. *v.* – – – 440

PAGE

Thomas, Craster *v.* – – – 348
——— *v.* United Butter Companies of France, Ld. – – 484
Thompson's Patent, *In re* – – 447
Toronto (Gutta Percha and India Rubber of) Company's Applications, *In re* – – (C.A.) 10
Tramways (Accrington Corporation Steam) Company, *In re* – 40
Tramways (Peckham, Dulwich and Crystal Palace) Bill, *In re* 540
Tredegar Dry Dock and Wharf Company, Ascherson *v.*– – 401

U.

United Butter Companies of France, Ld., Thomas *v.* – 484
United Service Share Purchase Society, *In re* – – – 526
University of London Medical Sciences Institute Fund, *In re*. Fowler *v.* Attorney-General (C.A.) 1

V.

Valentia (Viscount) *v.* Chesham (Lady). *In re* Lord Chesham's Settlement – – (C.A.) 329

W.

PAGE

Wagstaff's Settled Estates, *In re* 201
Water (Metropolitan) Board, South Suburban Gas Company *v.* – – – – 666
Water (West Gloucestershire) Company, Attorney-General *v.* (C.A.) 338
West, *In re*. West *v.* Roberts – 180
——— *v.* Roberts. *In re* West – 180
West Gloucestershire Water Company, Attorney-General *v.* (C.A.) 338
Whitfields Bedsteads' Application, *In re* – – – – 373
Wild *v.* Woolwich Borough Council – – – – 287
Williamson *v.* French. *In re* Mair – – – – – 280
Withall, Hill *v.* *In re* Rawlinson – – – – – 36
Woolwich Borough Council, Wild *v.* – – – – – 287

Z

Zerenner, *Ex parte*. *In re* Hatschek's Patents – – – 68

		PAGE
Attorney-General *v.* London County Council	[1901] 1 Ch. 781	345
——— *v.* Manchester Corporation	[1906] 1 Ch. 643	345
——— *v.* Moorsom Roberts	6 L. G. R. 470; 72 J. P. 123	591
——— *v.* Myddletons, Ld.	[1907] 1 I. R. 471	525
——— *v.* Pontypridd Waterworks Company	[1908] 1 Ch. 388	510
——— *v.* Rufford & Co., Ld.	[1899] 1 Ch. 537	271
——— *v.* Sheffield Gas Consumers Company	3 D. M. & G. 304	513
——— *v.* Simpson	[1901] 2 Ch. 671; [1904] A. C. 476	91
——— *v.* Staffordshire County Council	[1905] 1 Ch. 336	364
——— *v.* Wimbledon House Estate Company	[1904] 2 Ch. 34	513
Australian Wine Importers, In re	41 Ch. D. 278	12

B.

Badische Anilin und Soda Fabrik *v.* Thompson & Co.	21 Rep. Pat. Cas. 473	81
Bagshaw *v.* Buxton Local Board of Health	1 Ch. D. 220	593
Baker, In re	[1904] 1 Ch. 157	282
Bangor and Portmadoc Slate and Slab Company, In re	L. R. 20 Eq. 59	43
Bank of Bengal *v.* Fagan	7 Moo. P. C. 61	231
Bank of England *v.* Vagliano Brothers	[1891] A. C. 107	486
Barnard Castle Urban Council *v.* Wilson	[1902] 2 Ch. 746	672
Barnes *v.* Brown	[1909] 1 K. B. 38	23
Barraclough *v.* Brown	[1897] A. C. 615	156
Barrett, In re	43 Ch. D. 70	155
Barron *v.* Willis	[1899] 2 Ch. 578; [1900] 2 Ch. 121; [1902] A. C. 271	135
Bates, In re	[1907] 1 Ch. 22	114
Battams and Hutchinson, In re	[1897] 1 Ch. 699	173
Beale's Settlement, In re	[1905] 1 Ch. 256	469
Beauchamp (Lord) *v.* Great Western Railway Company	L. R. 3 Ch. 745	585
Bechervaise *v.* Lewis	L. R. 7 C. P. 372	403
Beckett & Co. *v.* Addyman	9 Q. B. D. 783	403
Belmore (Countess) *v.* Kent County Council	[1901] 1 Ch. 873	593
Belshaw *v.* Bush	11 C. B. 191	428
Besant *v.* Wood	12 Ch. D. 605	286
Birch *v.* Cropper	14 App. Cas. 525	43, 190
——— *v.* St. Marylebone (Vestry)	20 L. T. 697	291
——— *v.* Sherratt	L. R. 2 Ch. 644	21
Birmingham and District Land Company and Allday, In re	[1893] 1 Ch. 342	316
Biscoe *v.* Jackson	35 Ch. D. 460	6
Bishop *v.* Smyrna and Cassaba Railway Company	[1895] 2 Ch. 265	43
Blackburn, In re	43 Ch. D. 75	299

		PAGE
Blackburn Corporation *v.* Sanderson	[1902] 1 K. B. 794	270
Boddington, In re	22 Ch. D. 597	642
Boden, In re	[1907] 1 Ch. 132	21
Bond *v.* Barrow Hæmatite Steel Company	[1902] 1 Ch. 353	40
Booth *v.* Coulton	L. R. 5 Ch. 684	20
—— *v.* New Afrikander Gold Mining Company	[1903] 1 Ch. 295	664
Bouch *v.* Sproule	12 App. Cas. 385	113
Bowles, In re	[1902] 2 Ch. 650	453, 454
Boxall *v.* Boxall	27 Ch. D. 220	182, 355
Bracey, In re	8 Beav. 266	179
Bradford *v.* Belfield	2 Sim. 264	520
Bradlaugh *v.* Clarke	8 App. Cas. 354	486
Bradshaw, In re	[1902] 1 Ch. 436	469
Brandao *v.* Barnett	12 Cl. & F. 787	231
Braulik, Ex parte	[1909] 2 Ch. 217	81
Bremer's Patent, In re	[1909] 2 Ch. 217	81
Brewer *v.* Sparrow	7 B. & C. 310	356
Bridgewater Navigation Company, In re	[1891] 1 Ch. 155	43
——————, In re	39 Ch. D. 1	191
Brighton Marine Palace and Pier, Ld. *v.* Woodhouse	[1893] 2 Ch. 486	125
British and American Trustee and Finance Corporation *v.* Couper	[1894] A. C. 399	553
British Museum Trustees *v.* Finnis	5 C. & P. 460	592
Brocklesby *v.* Temperance Permanent Building Society	[1895] A. C. 173	229
Bromley, In re	7 Beav. 487	172
Brook *v.* Hook	L. R. 6 Ex. 89	356
Broughton *v.* Broughton	5 D. M. & G. 160	245
Brown, In re	Not reported	179
——— *v.* Dunstable Corporation	[1899] 2 Ch. 378	555
——— *v.* Gellatly	L. R. 2 Ch. 751	114
Brown's Estate, In re	[1893] 2 Ch. 300	404, 521
Brudenell *v.* Elwes	1 East, 442	461
Bryant, Powis & Bryant, Ld. *v.* Quebec Bank	[1893] A. C. 170	229
Buckland *v.* Buckland	[1900] 2 Ch. 534	140
Budgett, In re	[1894] 2 Ch. 557	487
——— *v.* Budgett	[1895] 1 Ch. 202	172
Bunney *v.* Poyntz	4 B. & Ad. 568	425
Burnham *v.* Bennett	2 Coll. 254; 9 Jur. 888; 1 De G. & Sm. 513	297, 302
Busby *v.* Waterworks and Gas Light Company	E. B. & E. 176	672
Buxton *v.* Lister	3 Atk. 383	444

C.

Cadman *v.* Cadman	33 Ch. D. 397	620
Cafe *v.* Bent	5 Hare, 24	117
California Fig Syrup Company *v.* Taylor's Drug Company	14 Rep. Pat. Cas. 341	101
Campbell *v.* Dent	2 Moo. P. C. 292	139
——— *v.* Holyland	7 Ch. D. 166	437

		PAGE
Cattlin *v.* Brown	11 Hare, 372	453
Cave *v.* Cave	8 D. M. & G. 131	297
Chalmer *v.* Bradley	1 Jac. & W. 51	521
Chamberlain's Wharf, Ld. *v.* Smith	[1900] 2 Ch. 605	155
Chamberlayne *v.* Brockett	L. R. 8 Ch. 206	4
Chambers, In re	11 Ir. Eq. Rep. 518	653
Chaytor, In re	[1905] 1 Ch. 233	113
Cherry *v.* Mott	1 My. & Cr. 123	6
Chesham (Lord), In re	31 Ch. D. 466	329
Chester Waterworks Company *v.* Chester Union	98 L. T. 701	672
Child *v.* Douglas	Kay, 560; 5 D. M. & G. 739	318
Child's Settlement, In re	[1907] 2 Ch. 348	203
Chinnock *v.* Hartley Wintney Rural Council	63 J. P. 327	594
Christophers *v.* Sparke	2 Jac. & W. 223	521
Clark, In re	13 Beav. 173; 1 D. M. & G. 43	179
Clarke, Ex parte	67 L. T. 465	494
——— *v.* Stamford	2 Bro. C. C. 583, n.	404
Clayton and Barclay's Contract, In re	[1895] 2 Ch. 212	198
Clayton's Case	1 Mer. 572	403
Clegg *v.* Edmondson	8 D. M. & G. 787	521
Cohen *v.* Mitchell	25 Q. B. D. 262	195
Cole *v.* North Western Bank	L. R. 10 C. P. 354	230
Collins v. Castle	36 Ch. D. 243	311
Commissioners for Special Purposes of the Income Tax *v.* Pemsel	[1891] A. C. 531	676
Compagnie Industrielle des Pétroles, In re	[1907] 2 Ch. 435	12
Cood *v.* Cood	33 Beav. 314	139
Cooke, Sons & Co. *v.* New River Company	38 Ch. D. 56; 14 App. Cas. 698	672
Cooper *v.* Cooper	13 App. Cas. 88	138
——— *v.* Martin	L. R. 3 Ch. 47	300
Coulden, In re	[1908] 1 Ch. 320	37
Coulthart *v.* Clementson	5 Q. B. D. 42	403
County Theatres and Hotels, Ld. *v.* Knowles	[1902] 1 K. B. 480	121
Crane, In re	[1908] 1 Ch. 379	432
Cranstown (Lord) *v.* Johnston	3 Ves. 170	139
Crawcour *v.* Salter	30 W. R. 329	626
Crichton's Oil Company, In re	[1902] 2 Ch. 86	40
Crosskill *v.* Bower	32 Beav. 86	245
Cuno, In re	43 Ch. D. 12	209
Curwen *v.* Milburn	42 Ch. D. 424	172

D.

Dale & Perry *v.* Lolley	2 Bro. C. C. 582, n	401
Dale's Case	6 Q. B. D. 376	487
Dalton *v.* Angus	6 App. Cas. 740	573
Damper *v.* Bassett	[1901] 2 Ch. 350	573
Darby *v.* Darby	3 Drew. 495	198
Davidson, In re	[1909] 1 Ch. 567	679
Davies *v.* Huguenin	1 H. & M. 730	653
——— *v.* Makuna	29 Ch. D. 596	25
——— *v.* Stephens	7 C. & P. 570	592
Davis, In re	[1902] 1 Ch. 876	6
——- *v.* Gyde	2 Ad. & E. 623	428

		PAGE
Davis *v.* Witney Urban Council	15 Times L. R. 275	291
Dawson *v.* Braime's Tadcaster Breweries, Ld.	[1907] 2 Ch. 359	609
Debendra Nath Dutt *v.* Administrator-General of Bengal	L. R. 35 Ind. Ap. 109	350
Debenham and Walker, In re	[1895] 2 Ch. 430	173
De Burgh Lawson, In re	34 W. R. 39	208
Denaby and Cadeby Main Collieries *v.* Yorkshire Miners' Association	23 Times L. R. 635	475
Denman & Co., Ld. *v.* Westminster Corporation	[1906] 1 Ch. 464	291
Devonport Corporation *v.* Tozer	[1903] 1 Ch. 759	270, 510
Dick *v.* Lacy	8 Beav. 214	37
Ditton, Ex parte	13 Ch. D. 318	172
Doe *v.* Hawkins	2 Q. B. 212	387
—— *v.* Vowles	1 Moo. & R. 261	397
—— *v.* Woodbridge	9 B. & C. 376	259
Doyle *v.* Blake	2 Sch. & Lef. 231	357
Duder *v.* Amsterdamsch Trustees Kantoor	[1902] 2 Ch. 132	139
Duke *v.* Littleboy	49 L. J. (Ch.) 802	155
Dummer *v.* Pitcher	2 My. & K. 262	208

E.

East London Railway Company *v.* Whitechurch	L. R. 7 H. L. 81	512
Eastman Photographic Materials Company *v.* Comptroller-General of Patents	[1898] A. C. 571	72, 102
Easton *v.* Richmond Highway Board	L. R. 7 Q. B. 69	594
Eastwood Brothers, Ld. *v.* Honley Urban Council	[1901] 1 Ch. 645	560
Ecclesiastical Commissioners *v.* London Commissioners of Sewers	14 Ch. D. 305	291
Ellis *v.* Ellis	[1905] 1 Ch. 613	349
Elliston *v.* Reacher	[1908] 2 Ch. 374, 665	318
Elmslie & Co., In re	L. R. 9 Eq. 72	172
Emslie *v.* Paterson	24 R. (Just. Cas.) 77	23
Eno *v.* Dunn	15 App. Cas. 252	12
European Bank, In re	L. R. 8 Ch. 41	231
Evans, Ex parte	13 Ch. D. 252	438
—— *v.* Astley	1 W. Bl. 522	461
Eyre, In re	10 Beav. 569	179

F.

Farbenfabriken Application, In re	[1894] 1 Ch. 645	102
Farquhar *v.* Newbury Rural Council	[1909] 1 Ch. 12	585
Fellowes *v.* Sedgley Urban Council	70 J. P. 412	271
Fenna *v.* Clare & Co.	[1895] 1 Q. B. 199	593
Finch *v.* Great Western Railway Company	5 Ex. D. 254	49
Fisher and Grazebrook's Contract, In re	[1898] 2 Ch. 660	61
Fitzroy *v.* Cave	[1905] 2 K. B. 364	254
Foakes *v.* Jackson	[1900] 1 Ch 807	653

		PAGE
Foley *v.* Burnell	1 Bro. C. C. 274; 4 Bro. P. C. 319	331
Foster *v.* Smith	1 Ph. 629	21
Fothergill's Estate, In re	[1903] 1 Ch. 149	332
Frederick *v.* Bognor Water Company	[1909] 1 Ch. 149	672
Freeman, In re	[1908] 1 Ch. 720	679
Frewen, In re	38 Ch. D. 383	61
Friern Barnet Urban Council *v.* Richardson	62 J. P. 547	594
Frogley *v.* Lovelace (Earl)	John. 333	443
Frost, In re	43 Ch. D. 246	453

G.

Gard *v.* London Commissioners of Sewers	28 Ch. D. 486	290
Garrard, In re	[1907] 1 Ch. 382	679
Gaskin *v.* Balls	13 Ch. D. 324	255
Gedge *v.* Bartlett	17 Times L. R. 43	312
Gervais *v.* Edwards	2 D. & War. 80	441
Gibbon *v.* Paddington Vestry	[1900] 2 Ch. 794	291
Gibson *v.* Fisher	L. R. 5 Eq. 51	37
Giffard *v.* Hort	1 Sch. & Lef. 386	626
Gittins *v.* Steel	1 Swans. 199	180
Glamorganshire County Council *v.* Great Western Railway Company	[1895] 1 Q. B. 21	475
Goldsmid *v.* Great Eastern Railway Company	25 Ch. D. 511	511, 573
Good, In re	[1905] 2 Ch. 60	411
Goodall's Settlement, In re	[1909] 1 Ch. 440	203
Gopal Dass Agrawallah *v.* Budree Dass Sureka	I. L. R. 33 Calc. 657	355
Gordon *v.* St. Mary Abbotts, Kensington (Vestry)	[1894] 2 Q. B. 742	291
Goucher's Patent, In re	2 Moo. P. C. (N.S.) 532	448
Graham *v.* Wade	16 East, 29	66
——— *v.* Wroughton	[1901] 2 Ch. 451	555
Grand Junction Canal Company *v.* Petty	21 Q. B. D. 273	585
Gray *v.* Siggers	15 Ch. D. 74	111
Graysbrook *v.* Fox	1 Plowd. 275	180, 357
Great Northern Railway Company *v.* M'Alister	[1897] 1 I. R. 587	49
Great Western Railway Company *v.* May	L. R. 7 H. L. 283	586
——— *v.* Solihull Rural Council	86 L. T. 852; 66 J. P. 772	585
——— *v.* Talbot	[1902] 2 Ch. 759	49
Greaves *v.* Tofield	14 Ch. D. 563	487
Greenwich Board of Works *v.* Maudslay	L. R. 5 Q. B. 397	592
Griffith *v.* Paget	6 Ch. D. 511	191
Groom Trust Estate, In re	11 L. T. 336	138
Gunn *v.* Bolckow, Vaughan & Co.	L. R. 10 Ch. 491	425
Gwawr-y-Gweithyr Industrial and Provident Society, In re	[1901] 2 K. B. 477	532

H.

		PAGE
Hadley *v.* Taylor	L. R. 1 C. P. 53	593
Hair, In re	10 Beav. 187	179
Hall (W. J.) & Co., In re	[1909] 1 Ch. 521	190
Hall *v.* Ewin	37 Ch. D. 74	252
Hall-Dare *v.* Hall-Dare	31 Ch. D. 251	638
Hambro *v.* Burnand	[1904] 2 K. B. 10	226
Hamilton, In re	31 Ch. D. 291	620
Hamlyn & Co. *v.* Wood & Co.	[1891] 2 Q. B. 488	642
Hampstead Corporation *v.* Midland Railway Company	[1904] 2 K. B. 802; [1905] 1 K. B. 538	511, 573
Hand *v.* Blow	[1901] 2 Ch. 721	285
Hardcastle *v.* South Yorkshire Railway and River Dun Company	4 H. & N. 67	593
Harris *v.* Northamptonshire County Council	61 J. P. 599	593
Harrogate Corporation *v.* Mackay	[1907] 2 K. B. 611	672
Hart *v.* Colley	44 Ch. D. 193	12, 103
v. Hart	18 Ch. D. 670	286
Hatch *v.* Hatch	9 Ves. 292	521
Hatschek's Patents, In re	26 Rep. Pat. Cas. 1; [1909] 2 Ch. 68	71, 218
Hay *v.* Coventry (Earl)	3 T. R. 83	461
Haynes *v.* Haynes	1 Dr. & Sm. 426	292
Hearle *v.* Greenbank	1 Ves. Sen. 298; 3 Atk. 695	213
Henderson *v.* Arthur	[1907] 1 K. B. 10	423
Hendon Local Board *v.* Pounce	42 Ch. D. 602	270
Henry *v.* Great Northern Railway Company	1 De G. & J. 606	43
Herbert, In re	34 Ch. D. 504	179
Herron *v.* Rathmines and Rathgar Improvement Commissioners	[1892] A. C. 498	511
Heydon's Case	3 Rep. 7 a.	72
Higham *v.* Ridgway	10 East, 109; 2 Sm. L. C., 11th ed., p. 327	387
Hirst & Capes, In re	[1908] 1 K. B. 982	171
Hockley *v.* Mawbey	1 Ves. 142	461
Högner's Patent, In re	[1909] 2 Ch. 217	81
Holford *v.* Acton Urban Council	[1898] 2 Ch. 240	309
Holliday *v.* Overton	14 Beav. 467	300
Holloway *v.* Egham Urban Council	6 L. G. R. 929; 72 J. P. 433	591
Holthausen, Ex parte	L. R. 9 Ch. 722	139
Honywood *v.* Honywood	92 L. T. 814	454
Horne's Settled Estate, In re	39 Ch. D. 84	203
Hotchkys, In re	32 Ch. D. 408	202
Hough *v.* Windus	12 Q. B. D. 224	73
Howarth, In re	L. R. 8 Ch. 415	620
Howden *v.* Yorkshire Miners' Association	[1903] 1 K. B. 308; [1905] A. C. 256	154
Howe *v.* Dartmouth (Earl)	7 Ves. 137 a; 1 W. & Tud., 7th ed., p. 68	111
Hubbard *v.* Hubbard	[1901] P. 157	642
Hudson *v.* Cripps	[1896] 1 Ch. 265	312
Hughes-Hallett *v.* Indian Mammoth Gold Mines Company	22 Ch. D. 561	401
Humberston *v.* Humberston	1 P. Wms. 332	454
Hungerford *v.* Hungerford	Gilb. 67	405
Hurst *v.* Hurst	21 Ch. D. 278	282
Hyde *v.* Hill	3 T. R. 377	66, 604

I.

		PAGE
Ievers' Settlements, In re	[1904] 1 I. R. 492	203
Irrigation Company of France, In re	L. R. 6 Ch. 176	484
Islington Vestry *v.* Hornsey Urban Council	[1900] 1 Ch. 695	565
Ives & Barker *v.* Willans	[1894] 2 Ch. 478	121

J.

Jackson *v.* Normanby Brick Company	[1899] 1 Ch. 438	516
Jacobs *v.* Crédit Lyonnais	12 Q. B. D. 589	139
Jacomb *v.* Turner	[1892] 1 Q. B. 47	363
Jaeger *v.* Mansions Consolidated, Ld.	87 L. T. 690	312
James *v.* Stevenson	[1893] A. C. 162	573
Jarman, Ex parte	4 Ch. D. 835	171
Jervis *v.* Wolferstan	L. R. 18 Eq. 18	180
Johnson *v.* Johnson	3 B. & P. 162	182
Johnson's Trusts, In re	L. R. 2 Eq. 716	332
Jones *v.* Barnett	[1899] 1 Ch. 611	626
—— *v.* Tanner	7 B. & C. 542	182

K.

Keates *v.* Lyon	L. R. 4 Ch. 218	312
Keighley, Maxsted & Co. *v.* Durant	[1901] A. C. 240	356
Kelly *v.* Davis	28 La. An. 773	139
Kenny, In re	97 L. T. 130	679
King *v.* Melling	1 Vent. 225	654
Kingston, Ex parte	L. R. 6 Ch. 632	231
Kirkwood *v.* Webster	9 Ch. D. 239	474
Komollochun Dutt *v* Nilruttun Mundle	I. L. R. 4 Calc. 360	355

L.

Lambert *v.* Parker	G. Coop. 145	432
Law Guarantee and Trust Society *v.* Mitcham and Cheam Brewery Company	[1906] 2 Ch. 98	613
Lee *v.* Neuchatel Asphalte Company	41 Ch. D. 1	113
—— *v.* Rook	Mos. 318	403
Leigh, In re	40 Ch. D. 290	260
Lemmon *v.* Webb	[1895] A. C. 1	593
Le Neve *v.* Mile End Old Town Vestry	8 E. & B. 1054	593
Leslie, In re	23 Ch. D. 552	503
—— *v.* Leslie	Ll. & G. t. Sugden 1	431
Lloyd *v.* Dimmack	7 Ch. D. 398	404
Loftus-Otway, In re	[1895] 2 Ch. 235	281
London and Midland Bank *v.* Mitchell	[1899] 2 Ch. 161	521
London, Chatham and Dover Railway Company *v.* South Eastern Railway Company	60 L. T. 753	474
London County Council *v.* Attorney-General	[1902] A. C. 165	343, 510
London India Rubber Company, In re	L. R. 5 Eq. 519	44
London Joint Stock Bank *v.* Simmons	[1892] A. C. 201	230
Lovell *v.* Smith	3 C. B. (N.S.) 120	573

		PAGE
Lowe *v.* Adams	[1901] 2 Ch. 598	443
Lubbock *v.* British Bank of South America	[1892] 2 Ch. 198	190
Lurgan Urban Council to Moore and Johnston	[1906] 1 I. R. 599	399
Lyons & Co. *v.* London Corporation	[1909] 2 K. B. 588	673

M.

McAndrew *v.* Bassett	4 D. J. & S. 380	103
Macdonald *v.* Irvine	8 Ch. D. 101	117
Macduff, In re	[1896] 2 Ch. 451	678
Mackellar *v.* Bond	9 App. Cas. 715	134
M'Laren *v.* Miller	7 R. 867	168
Madden *v.* Rhodes	[1906] 1 K. B. 534	154
Maddock *v.* Wallasey Local Board	55 L. J. (Q.B.) 267	594
Magnolia Metal Company's Trade Marks, In re	[1897] 2 Ch. 371	104
Malam, In re	[1894] 3 Ch. 578	113
Mansfield *v.* Relf	[1908] 1 K. B. 71	66, 602
Margetts, In re	[1896] 2 Ch. 263; 65 L. J. (Ch.) 479	171, 178
Markham, In re	16 Ch. D. 1	626
Marlborough (Duke) *v.* Godolphin (Earl)	1 Eden, 404	455
——— *v.* Sartoris	32 Ch. D. 616	61
Marshall *v.* Green	1 C. P. D. 35	444
Martin *v.* Martin	2 Russ. & My. 507	139
Master *v.* Hansard	4 Ch. D. 718	314
Mathews *v.* Saurin	31 L. R. Ir. 181	401
Mathurádás Lowji *v.* Goculdás Mádhowji	I. L. R. 10 Bom. 468	355
Maudslay, Sons & Field, In re	[1900] 1 Ch. 602	139
Mercantile Investment and General Trust Company *v.* River Plate Trust, Loan and Agency Company	[1892] 2 Ch. 303	139
Mercer *v.* Liverpool, St. Helens, and South Lancashire Railway Company	[1903] 1 K. B. 652	292
Metropolitan Board of Works *v.* Nathan	54 L. T. 423	271
Metropolitan Electric Supply Company *v.* Ginder	[1901] 2 Ch. 799	254
Metropolitan Water Board *v.* Paine	[1907] 1 K. B. 285	672
Midland Railway Company *v.* Wright	[1901] 1 Ch. 738	586
Mitchell *v.* Simpson	25 Q. B. D. 183	487
Mogg *v.* Mogg	1 Mer. 654	454
Mogridge *v.* Clapp	[1892] 3 Ch. 382	61
Montagu, In re	[1896] 1 Ch. 549	626
Monypenny *v.* Dering	2 D. M. & G. 145; 16 M. & W. 418	450, 465
Moody, In re	[1895] 1 Ch. 101	433
Moorcock, The	14 P. D. 64	642
Moore *v.* Frowd	3 My. & Cr. 45	245
——— *v.* Knight	[1891] 1 Ch. 547	389
——— *v.* Rawson	3 B. & C. 332	573
Morgan *v.* Morgan	14 Beav. 72	114
Morley, In re	L. R. 20 Eq. 17	398
Morris, In re	[1898] 2 Ch. 413; [1899] 1 Ch. 485	495

		PAGE
Moser *v.* Marsden	[1892] 1 Ch. 487	438
Moses, In re	[1902] 1 Ch. 100	300
Mulliner *v.* Midland Railway Company	11 Ch. D. 611	51, 585
Murray, In re	[1867] W. N. 190	171
Mutton *v.* Peat	[1900] 2 Ch. 79	230

N.

National Guaranteed Manure Company *v.* Donald	4 H. & N. 8	510
National Starch Company's Application, In re	[1908] 2 Ch. 698	99
Neeld *v.* Hendon Urban Council	81 L. T. 405	594
New Land Development Association and Gray, In re	[1892] 2 Ch. 138	198
New Windsor Corporation *v.* Stovell	27 Ch. D. 665	561
Newington Local Board *v.* Cottingham Local Board	12 Ch. D. 725	559
Nightingale *v.* Goulbourn	2 Ph. 594	679
Nisbet *v.* Smith.	2 Bro. C. C. 579	401
Noakes *v.* Noakes & Co.	[1907] 2 Ch. 359	614
Norman, In re	16 Q. B. D. 673	171
Norris *v.* Chambres	3 D. F. & J. 583	139
North Eastern Marine Engineering Company *v.* Leeds Forge Company	[1906] 1 Ch. 324	364
Nottingham Patent Brick and Tile Company *v.* Butler	15 Q. B. D. 261; 16 Q. B. D. 778	311

O.

Oak *v.* Lumsden	3 Juta, 144	138
Odessa Waterworks Company, In re	[1901] 2 Ch. 190, n.	44
O'Duffy *v.* Jaffe, Ld.	[1904] 2 I. R. 27	525
Official Receiver *v.* Cooke	[1906] 2 Ch. 661	198
Offin *v.* Rochford Rural Council	[1906] 1 Ch. 342	364, 591
Oliver's Settlement, In re	[1905] 1 Ch. 191	450
Onley *v.* Gardiner	4 M. & W. 496	573
Orr-Ewing *v.* Registrar of Trade Marks	4 App. Cas. 479	103
Orton's Trust, In re	L. R. 3 Eq. 375	37
Osborne *v.* Bradley	[1903] 2 Ch. 446	318

P.

Padwick *v.* Stanley	9 Hare, 627	401
Palmer *v.* Bramley	[1895] 2 Q. B. 405	425
Panhaus *v.* Brown	68 J. P. 435	27
Park, In re	41 Ch. D. 326	172
Parmiter *v.* Parmiter	2 D. F. & J. 526	626
Parr's Banking Company *v.* Yates	[1898] 2 Q. B. 460	403
Paterson *v.* St. Andrews (Provost of)	6 App. Cas. 833	585
Pearce *v.* Bullard, King & Co.	[1908] 1 Ch. 780	492
Peel *v.* London and North Western Railway Company	[1907] 1 Ch. 607	472
Pender, In re	2 Ph. 69	171
Pescod *v.* Westminster Corporation	[1905] 2 Ch. 475	291
Pett *v.* Fellows	1 Swans. 561, n.	431

		PAGE
Pharmaceutical Society *v.* London and Provincial Supply Association	5 App. Cas. 857	525
Philipps *v.* Halliday	[1891] A. C. 228	578
Phillips *v.* Gutteridge	3 D. J. & S. 332	21
Pickering *v.* Stamford (Lord)	2 Ves. 272	521
Pickup *v.* Atkinson	4 Hare, 624	117
Pidgeon *v.* Great Yarmouth Waterworks Company	[1902] 2 Ch. 746	672
Pollard, Ex parte	Mont. & Ch. 239	139
Polson *v.* Stewart	167 Mass. 211; 57 Amer. State Rep. 452	139
Poole *v.* Huskinson	11 M. & W. 827	591
—— *v.* National Bank of China, Ld.	[1907] A. C. 229	553
Porter *v.* Baddeley	5 Ch. D. 542	111
Potts *v.* Britton	L. R. 11 Eq. 433	300
Pound *v.* Plumstead Board of Works	L. R. 7 Q. B. 183	272
Powers *v.* Bathurst	49 L. J. (Ch.) 294	592
Prestwick St. Nicholas Golf Club Trustees *v.* Prestwick Corporation	(1909) S. C. 94	672
Price *v.* Parker	16 Sim. 198	300
—— *v.* Torrington (Earl)	1 Salk. 285; 2 Sm. L. C., 11th ed., p. 320	396
Pundit Prayrag Rag *v.* Goukaram Pershad Tewari	Calc. W. N., Vol. VI., p. 787	355
Pyne, In re	5 C. B. 407	172

Q.

Quartermaine's Case	[1892] 1 Ch. 639	501

R.

Radcliffe *v.* Eccles	1 Keen, 130	626
Ralph *v.* Carrick	11 Ch. D. 873	38
Ranelaugh *v.* Hayes	1 Vern. 189	401
Ransom, In re	18 Beav. 220	179
Reg. *v.* Bradfield (Inhabitants of)	L. R. 9 Q. B. 552	363
—— *v.* Brown	L. R. 2 Q. B. 630	49
—— *v.* Chorley	12 Q. B. 515	574
—— *v.* Fisher	3 B. & S. 191	50
—— *v.* Goole Local Board	[1891] 2 Q. B. 212	270, 271
—— *v.* Lower Heyford (Inhabitants)	2 Sm. L. C., 11th ed., p. 339	397
—— *v.* Petrie	4 E. & B. 737	586
—— *v.* Wilts (Inhabitants of)	1 Salk. 359	363
Renals *v.* Cowlishaw	9 Ch. D. 125; 11 Ch. D. 866	313, 318
Rex *v.* Barr	4 Camp. 16	592
—— *v.* Hungerford Market Company	4 B. & Ad. 327	291
—— *v.* Leake (Inhabitants)	5 B. & Ad. 469	586
—— *v.* Lloyd	1 Camp. 260	592
—— *v.* Registrar of Joint Stock Companies for Ireland	[1904] 2 I. R. 634	525
Rhondda and Swansea Railway Company *v.* Talbot	[1897] 2 Ch. 131	51
Rhymney Railway Company *v.* Glamorganshire Canal Navigation Company	91 L. T. 113	510
Rich *v.* Cockell	9 Ves. 369	206

		PAGE
Richardson *v.* Le Maitre	[1903] 2 Ch. 222	124
Rigby *v.* Connol	14 Ch. D. 482	155
Robinson *v.* Barton Local Board	21 Ch. D. 621; 8 App. Cas. 798	271
——— *v.* Cowpen Local Board	63 L. J. (Q.B.) 235	594
——— *v.* Montgomeryshire Brewery Company	[1896] 2 Ch. 841	229
——— *v.* Shepherd	4 D. J. & S. 129	37
Rochefoucauld *v.* Boustead	[1897] 1 Ch. 196	523
Rogers *v.* Hosegood	[1900] 2 Ch. 388	312
Roots *v.* Williamson	38 Ch. D. 485	230
Roth, In re	74 L. T. 50; [1896] W. N. 16	550
Rothes (Countess) *v.* Kirkcaldy and Dysart Waterworks Commissioners	7 App. Cas. 694	511
Rouse *v.* Bradford Banking Company	[1894] A. C. 586	229, 403
Rowe *v.* Brenton	3 Man. & Ry. 133, 267; 2 Sm. L. C., 11th ed., p. 344	387
Royal College of Veterinary Surgeons *v.* Collinson	[1908] 2 K. B. 248	27
——— *v.* Robinson	[1892] 1 Q. B. 557	27
Royal Worcester Corset Company's Application, In re	[1909] 1 Ch. 459	99
Rugby Charity Trustees *v.* Merryweather	11 East, 376, n.	592

S.

St. George's Local Board *v.* Ballard	[1895] 1 Q.B. 702	271
San Paulo (Brazilian) Railway Company *v.* Carter	[1896] A. C. 31	551
Saunders' Case.	5 Rep. 12 a.	180
Savin, In re	L. R. 7 Ch. 760	501
——— *v.* Hoylake Railway Company	L. R. 1 Ex. 9	511
Scarsdale (Lord) *v.* Curzon	1 J. & H. 40	331
Scinde, Punjaub and Delhi Corporation, In re	L. R. 6 Ch. 53, n.	43
Scowcroft, In re	[1898] 2 Ch. 638	679
Scrope *v.* Offley.	1 Bro. P. C. 276	648
Securities Insurance Company, In re	[1894] 2 Ch. 410	626
Selot's Trust, In re	[1902] 1 Ch. 488	139
Shaik Moosá *v.* Shaik Essá	I. R. L. 8 Bom. 241	355
Sharpe, In re	[1892] 1 Ch. 154	523
Sheffield (Earl) *v.* London Joint Stock Bank	13 App. Cas. 333	230
Sheldon, In re	39 Ch. D. 50	114
Shelley's Case	1 Rep. 93 b.	462
Sheppard *v.* Scinde, Punjaub and Delhi Railway Company	[1887] W. N. 47, 132; 35 W. R. 516; 36 W. R. 1; 60 L. T. 641	43
Sherry, In re	25 Ch. D. 692	403
Sheward, In re	[1893] 3 Ch. 502	281
Slevin, In re	[1891] 2 Ch. 236	6
Smart *v.* Tranter	43 Ch. D. 587	208
Smith and Logan, In re	2 Man. 70	495
Smith *v.* Buller.	L. R. 19 Eq. 473	475
——— *v.* Clay	3 Bro. C. C. 640, n.	522
——— *v.* Humble	15 C. B. 321	66, 602
——— *v.* Langford	2 Beav. 362	241
——— *v.* Müller.	[1894] 1 K. B. 192	673

		PAGE
Soar *v.* Foster	4 K. & J. 152	642
Société Générale de Paris *v.* Geen	8 App. Cas. 606	501
Somerset, In re	[1894] 1 Ch. 231	388
Somes *v.* Currie	1 K. & J. 605	13
South African Supply and Cold Storage Company, In re	[1904] 2 Ch. 268	193
South-West Suburban Water Company *v.* St. Marylebone Union	[1904] 2 K. B. 174	672
Spedding *v.* Fitzpatrick	38 Ch. D. 410	592
Spicer *v.* Martin	14 App. Cas. 12	311
Steele *v.* Liverpool Corporation	7 B. & S. 261	291
Stockport District Water Company *v.* Manchester Corporation	9 Jur. (N.S.) 266	510
Straubenzee, In re	[1901] 2 Ch. 779	117
Stucley, In re	[1906] 1 Ch. 67	521
Sunderland Corporation *v.* Brown	44 J. P. 831	270
Swindon Waterworks Company *v.* Wilts and Berks Canal Navigation Company	L. R. 7 H. L. 697	511

T.

Taff Vale Railway Company *v.* Pontypridd Urban Council	3 L. G. R. 1339; 69 J. P. 351	585
Tawney *v.* Lynn and Ely Railway Company	16 L. J. (Ch.) 282	291
Taylor *v.* Witham	3 Ch. D. 605	396
Tempest *v.* Camoys (Lord)	21 Ch. D. 571	550
Teuliere *v.* St. Mary Abbotts, Kensington (Vestry)	30 Ch. D. 642	290
Thomas *v.* Sorrell	Vaugh. 330	441
Thompson *v.* Hammersmith Corporation	[1906] 1 Ch. 299	291
Thomson *v.* Shakespear	1 D. F. & J. 399	6
Thornley *v.* Thornley	[1893] 2 Ch. 229	641
Thurgood, In re	19 Beav. 541	172
Toplis *v.* Baker	2 Cox, 118	521
Trash *v.* White	3 Bro. C. C. 289	521
Tulk *v.* Moxhay	2 Ph. 774	255
Turner *v.* Ringwood Highway Board	L. R. 9 Eq. 418	593
Turney & Son's Trade Mark, In re	10 Times L. R. 175	13
Tuthill, In re	[1907] 1 I. R. 305	203
Twiss's Trust, In re	15 W. R. 540	300

U.

United Land Company *v.* Great Eastern Railway Company	L. R. 10 Ch. 586	49
Uxbridge and Rickmansworth Railway Company, In re	43 Ch. D. 536	291

V.

Van Duzer's Trade Mark, In re	34 Ch. D. 623	102
Vautin, In re	[1899] 2 Q. B. 549	495
Villers-Wilkes, In re	72 L. T. 323	6

W.

		PAGE
Wakefield Rolling Stock Company, In re	[1892] 3 Ch. 165	191
Walsh *v.* Lonsdale	21 Ch. D. 9	442
Walthamstow Urban Council *v.* Sandell	68 J. P. 509	272
Ware *v.* Regent's Canal Company	3 De G. & J. 212	510
Watson *v.* Atkins	3 B. & Ald. 647	66
——— *v.* Home	7 B. & C. 285	66, 602
——— *v.* Postan	1 Dowl. 556	172
Web *v.* Paternoster	Pal. 71.	444
Webb *v.* Earle	L. R. 20 Eq. 556	193
——— *v.* Fagotti Brothers	79 L. T. 683	254
West London and General Permanent Benefit Building Society, In re	78 L. T. 393	533
Whitby *v.* Mitchell	42 Ch. D. 494; 44 Ch. D. 85	453
White, In re	[1893] 2 Ch. 41	678
Whitfield *v.* Brandwood	2 Stark. 440	66, 604
Whitting *v.* Whitting	53 Sol. J. 100	450
Wiggins *v.* Peppin	2 Beav. 403	179
Wilkinson, Ex parte	3 De G. & Sm. 633	21
Williams, In re	[1892] W. N. 81; 40 W. R. 636	246
——— *v.* Geaves	8 Car. & P. 592	387
——— *v.* Powning	48 L. T. 672	271
——— *v.* Thomas	[1909] 1 Ch. 713	521
Wilson, In re	24 Ch. D. 664	37
———	[1907] 1 Ch. 394	113
———	[1893] 2 Ch. 340	199
Winchester (Bishop) *v.* Paine	11 Ves. 191	439
Wolfe *v.* Matthews	21 Ch. D. 194; 51 L. J. (Ch.) 833	154
Wolmershausen *v.* Gullick	[1893] 2 Ch. 514	405
Wood *v.* Leadbitter	13 M. & W. 838	441
——— *v.* Manley	11 Ad. & E. 34	443
Wooldridge *v.* Norris	L. R. 6 Eq. 410	401
Worthington *v.* Wigley	3 Bing. N. C. 454	429
Wright, In re	[1906] 2 Ch. 288	469

Y.

Yeo *v.* Leman	2 Str. 1191	66, 604
Yorkshire Miners' Association *v.* Howden	[1903] 1 K. B. 308; [1905] A. C. 256	154
Young *v.* Star Omnibus Company	86 L. T. 41	573

Z.

Zalinoff *v.* Hammond	[1898] 2 Ch. 92	125
Zerenner, Ex parte	[1909] 2 Ch. 68	218

CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

In re UNIVERSITY OF LONDON MEDICAL SCIENCES INSTITUTE FUND.

FOWLER *v.* ATTORNEY-GENERAL.

[1908 U. 156.]

C. A.
1908
JOYCE J.
June 30;
July 1, 18.
1909
C. A.
Feb. 22.

Will—Charity—Proposed Scheme for Institute of Medical Sciences—Appeal to Public—Fund for Project—Voluntary Contributions—Legacy to Fund by Contributor—Subsequent Impossibility of Scheme—Abandonment—Return of Contributions—Charitable Intent—Cyprès—Failure of Legacy.

Testator bequeathed a legacy of £25,000 to "The Institute of Medical Sciences Fund, University of London." The fund had been started by voluntary contributions in the testator's lifetime, with the object of carrying out a proposed scheme for the establishment of an Institute of Medical Sciences, and the testator himself had contributed largely to the fund. His executors paid the legacy to the trustees of the fund, but, subsequently, the scheme proved impracticable and was finally abandoned, and the various contributions were returned to the respective donors. On the question whether the legacy had been definitely devoted to a charitable purpose and ought to be administered cyprès :—

Held (affirming the decision of Joyce J.), that the legacy was a gift to take effect upon the happening of a condition which had failed; that there was no general charitable intent to be gathered from the will; and that the legacy must be repaid to the executors.

ADJOURNED SUMMONS.

At a meeting of the Senate of the University of London held on October 22, 1902, it was resolved "that steps be taken to secure a site and funds to enable the Senate to

C. A. 1909

UNIVERSITY OF LONDON MEDICAL SCIENCES INSTITUTE FUND, *In re.* FOWLER *v.* ATTORNEY-GENERAL.

establish an Institute of Medical Sciences in the near neighbourhood of the University," and in the year 1903 a printed appeal was sent out to certain members of the public for funds for establishing the proposed institute, and a committee was appointed to supervise the appeal.

The plaintiffs, James Kingston Fowler and Henry Trentham Butlin, were members of the committee and treasurers of the proposed fund, which was called "The Institute of Medical Sciences Fund, University of London." Donations to a considerable amount were promised by various members of the public, and the testator, Alfred Beit, gave a donation of 25,000*l.* to be paid in five annual instalments of 5000*l.* each, of which the first two were paid on March 31, 1905, and the third on March 29, 1906. The testator died on July 16, 1906, having by his will, dated April 18, 1905, appointed the defendants Otto Beit, Franz Voelklein, and Julius Charles Wernher executors and trustees thereof. The testator thereby directed that out of his estate should be paid (inter alia) all his debts, including any voluntary liabilities incurred or to be incurred by him, and bequeathed a legacy in the following terms:—"I give twenty-five thousand pounds to the Institute of Medical Sciences Fund University of London." The testator also directed that all pecuniary legacies not paid at the expiration of three calendar months after his death should thenceforward until payment carry interest at 4*l.* per cent. Shortly before his death the testator by a codicil to his will confirmed the bequest, it being at that time well known to him that there was a difficulty in raising funds to carry out the scheme.

On March 4, 1907, the defendant executors paid to the plaintiffs the legacy of 25,000*l.* together with accrued interest, and on March 31, 1907, they paid to the plaintiffs the sum of 5000*l.*, being the fourth instalment of the testator's original donation. For various reasons the Senate was unable to carry out the proposed scheme, and in consequence thereof it was duly resolved that the donations should be returned to the respective donors.

The question was then raised whether the legacy bequeathed by the testator ought to be repaid, or whether it was impressed

with a charitable trust and ought to be administered by the Court.

The plaintiffs thereupon took out this summons against the Attorney-General, the defendant executors, and the University of London for the determination of the question.

The summons came on for hearing before Joyce J. on June 30, 1908.

Norton, K.C., and *Knowles Corrie*, for the plaintiffs.
Levett, K.C., and *W. M. Spence*, for the defendant executors.
Sargant (*Sir W. S. Robson, A.-G.*, with him), for the Crown.
Howard Wright, for the defendants, the University of London.

Cur. adv. vult.

1908. July 18. JOYCE J. In the year 1902 or 1903 a scheme was projected by the University of London for establishing an Institute of Medical Sciences, the precise nature and object of which was set forth in various printed documents. An appeal was made to the public for pecuniary support, and considerable sums were promised, some of them being paid to the treasurers of the fund that was being raised to carry out the projected scheme. The fund was intituled "The Institute of Medical Sciences Fund, University of London."

The testator subscribed to the fund, and by his will, made on April 18, 1905, he bequeathed a legacy in these terms: "I give twenty-five thousand pounds to the Institute of Medical Sciences Fund University of London." In process of time, and before the institute could be established, various difficulties arose, and it was ultimately decided—quite properly, as it appears to me—that owing to the lack of adequate financial support the scheme for the establishment of the Institute of Medical Sciences had proved abortive; that, apart from the money difficulty, which was of itself fatal, the scheme had also become impracticable because the medical faculty, which formerly had reported in its favour, had now reported against it, and several of the medical schools had changed their opinion in the same sense, and some of them had made arrangements involving considerable outlay for providing instruction in preliminary and

C. A. 1909 — UNIVERSITY OF LONDON MEDICAL SCIENCES INSTITUTE FUND. *In re.* FOWLER *v.* ATTORNEY-GENERAL. — Joyce J.

intermediate medical studies themselves. In other words, the scheme was found to be impracticable and was abandoned; and, further, it was determined by the University authorities that the University of London had no claim to the moneys which had been already paid by subscribers, or to the fulfilment of the promises made by subscribers who had not yet paid their subscriptions, but that, in the absence of any special directions in any particular case, all subscriptions already paid ought at once to be returned to the donors, including in that term the representatives of deceased donors.

As to the return of subscriptions or donations no serious question was or could be raised. But with reference to the legacy given by Mr. Bett's will it has been suggested on behalf of the Attorney-General that the money had been definitely devoted to a charitable purpose, and ought, therefore, to be applied cypris, the object to which it was originally devoted having failed. I cannot accede to that suggestion. There is not one word in the will upon which to found the theory of the testator having any general charitable intent, or any intention to contribute to any general or other purpose of charity save only the particular scheme of the projected institute. *Chamberlayne* v. *Brockett* (1) shews that a fund may be given or bequeathed conditionally to charity, and that if the condition be not performed there is no dedication to charity. In my opinion the bequest of the legacy in question "to the Institute of Medical Sciences Fund University of London" was not, in the circumstances, a final dedication thereof to charity. Its application to a charitable purpose was only contingent and dependent upon the scheme for the institute proving to be feasible and being carried out. There was no more a final dedication to some or any charitable purpose in reference to the legacy than was the case with respect to the contributions of the living donors, and that contributions towards a scheme which it is found cannot be carried out are returnable to the donors is a matter of course. Here there was a condition implied and well understood by all parties which cannot be fulfilled, and I must hold that the legacy given for the purposes of a scheme which has proved impracticable and has been finally

(1) (1872) L. R. 8 Ch. 206.

abandoned, and that was given for no other purpose, fails altogether, and as it has been already handed over to the plaintiffs it must be repaid by them.

R. M.

The Crown appealed. The appeal was heard on February 22, 1909.

Sir W. S. Robson, *A.-G.*, and *Sargant*, for the Crown. Under the circumstances there has been a good charitable gift by will, and the executors are not entitled to repayment of the amounts paid by them to the fund. The carrying out of the object of the gift is no doubt suspended, but there has been in strictness no failure of that object, for the fund which was started for its accomplishment, in itself a charitable fund, was in existence at the time of the testator's death, and the money was paid over by the executors to the trustees of that fund. The gift by will of the 25,000*l.* to the fund shews a general charitable intention in the testator, and the will contains no provision for its falling into the residue in the event of the failure of the gift. The Courts will not allow a charitable gift to fail unless the circumstances are very exceptional, but will struggle to apply the cypres doctrine. There has been no initial failure of the gift, for the failure (if any) was subsequent to the testator's death; the only recognized cases of initial failure are those where the object of the gift ceases to exist between the making of the will and the death of the testator, and cases where the gift is for the benefit of a particular locality and it is impossible to carry out the purpose in that locality. There was at the testator's death an existing charitable body which could, and did, obtain possession of the money for the purpose of devoting it to a well-known charitable scheme. It is admitted that living subscribers could under the circumstances ask for the return of their money, for they would be able to express their intention; but that would be impossible in the case of a deceased subscriber, and the money paid over by him or his executors would be impressed with a charitable trust in the hands of the trustees of the fund. In the case of money paid over by a living subscriber there would be a contract that in the future a trust would be formed for carrying out the particular

C. A. 1909

UNIVERSITY OF LONDON MEDICAL SCIENCES INSTITUTE FUND, *In re.* FOWLER *v.* ATTORNEY-GENERAL.

object, but in the case of a legacy by will no such question of a contract can arise. The authorities shew clearly that where the gift could operate at the date of the death of the testator it is not affected by the subsequent failure of the definite charitable object. In *In re Slevin* (1) it was held that a charitable bequest to an institution which came to an end after the death of the testator, but before payment over of the legacy, did not fail for the benefit of the residuary legatee and should be administered by the Crown for charitable purposes. *Chamberlayne* v. *Brockett* (2) shews that in the present case the gift was not conditional or contingent, but that there was an absolute immediate gift to charity, the mode of execution only being dependent on future events. There is no suggestion in the will that the gift is conditional on the institute being founded at all. In *Cherry* v. *Mott* (3), upon which the defendants will rely, there was clearly a condition attached to the gift, which condition was incapable of fulfilment. Although there may be a failure of the specific object of a gift, yet, if the general object continues to exist, there is a good charitable gift for a purpose which has not failed: *In re Villers-Wilkes.* (4) *In re Davis* (5) affords a strong illustration of the tendency of the Courts to infer that a gift has been made for general charitable objects even where the specific object does not exist, and to give effect to the testator's intention as nearly as may be. Here the general object was the advancement of scientific medical education, and there was a fund in existence for the carrying out of that object. In arriving at the intention of the testator it must not be forgotten that by a codicil to his will he confirmed the bequest, although he then knew of the difficulty of raising the money for the particular scheme. [They also cited *Biscoe* v. *Jackson* (6); *Thomson* v. *Shakespear.* (7)]

Norton, K.C., and *Knowles Corrie*, for the plaintiffs; *Levett, K.C.*, and *W. M. Spence*, for the executors; and *Howard Wright*, for the University of London, were not called upon to argue.

(1) [1891] 2 Ch. 236.
(2) L. R. 8 Ch. 206.
(3) (1835) 1 My. & Cr. 123.
(4) (1895) 72 L. T. 323.
(5) [1902] 1 Ch. 876.
(6) (1887) 35 Ch. D. 460.
(7) (1860) 1 D. F. & J. 399.

VAUGHAN WILLIAMS L.J. I think that the judgment of Joyce J. was quite right. In my opinion the bequest in this will was clearly conditional upon a fund being raised sufficient for the object described in the appeal. No one suggests that a sufficient sum was raised. This being therefore a conditional gift, that is to say, a gift of money for the purpose of instituting this intended school, it proved impossible to institute the school, not only because a sufficient sum of money could not be raised for the purpose, but also because, in the face of the change of view in the medical profession and the objections taken by the hospital schools of medicine, the idea had to be abandoned. How is it proposed to get out of this difficulty? The contention for the appellants may be put thus: "It is true that this does look like a case of a gift by will subject to a condition and to take effect only on the happening of the condition; but when the terms of the will are looked at there will be found a general intention to be charitable in the particular direction of the teaching of medicine." I find no such general intention. I find only an intention to join in a subscription for the purpose of instituting a particular school or institute of medicine if a sufficient sum of money can be raised for that purpose. The money could not be raised for the purpose, and under the circumstances it seems to me that the gift lapsed.

I lay no stress upon the fact that the Attorney-General, in stating his case to us, in substance adopted the return of their money to the living subscribers, as the object of their subscriptions had failed. It is true that he endeavoured to avoid the analogy arising from this return of their subscriptions by saying that it made all the difference that in the one case the gift was one by a man in his lifetime and that in the other it was a gift by will. I confess that I could not follow the way in which he sought to establish that difference. I think he rather adopted the view that a gift by a living man to take effect upon a condition and a gift by will to take effect upon a condition did not differ in principle. He then protested that he must not be taken to approve of the legal propriety of the return of their money to living subscribers. Under these circumstances I think we are inevitably brought to the conclusion

C. A. 1909

UNIVERSITY OF LONDON MEDICAL SCIENCES INSTITUTE FUND, *In re.* FOWLER *v.* ATTORNEY-GENERAL.

Vaughan Williams L.J.

that this was a gift to take effect upon the happening of a condition.

Many cases were cited to us in argument to shew what the Attorney-General called the leaning of the Courts in favour of general charity. But each case must depend either upon the terms of the particular will or upon the terms of the particular gift or upon the particular circumstances, as the case may be, and I am sure that neither of the learned counsel for the appellants meant to suggest that, where the terms of the gift or of the will plainly point to a gift or a bequest to take effect upon a condition, the Courts have ever thought it right to be benevolent with a testator's money contrary to the plain intention of his will.

FARWELL L.J. I am of the same opinion and think that the judgment of Joyce J. was quite right. In 1902 the University of London was minded to found an Institute of Medical Sciences, and for that purpose issued an appeal to the public. The testator was one of those who acceded to the appeal, and he not only subscribed several thousand pounds in his lifetime, but also made this gift by his will. Unfortunately, owing to various circumstances, including a change of opinion among the medical profession, the Senate was obliged at last to determine that the University was not in a position to carry out the proposed scheme for the establishment of an Institute of Medical Sciences. I do not think that anybody who was not a lawyer could for one moment doubt that the University were bound to return at once to the living subscribers the moneys which had been sent to them for a scheme which they had abandoned; but we are asked to say that although that may be so—and I am not sure whether the Attorney-General admits it or not—we ought to construe a will, which contains words in all probability similar to those which the testator wrote in every letter in which he enclosed a subscription, as shewing an intention to give this money for general charitable purposes, and not to the particular institute conditionally upon that institute being called into existence. I am wholly unable to follow Mr. Sargant's suggestion founded on a contract between the parties. When money has once been paid over to the trustees in the lifetime of the donor a

complete trust is created, and the money must be held on the trusts declared by the donor; the right of the donor to a return of the money arises when the trust is on the face of it contingent on the proposed institute being called into being. I can see no difference between that case and the case of the testator. It is well settled law that a legacy may be given to a charity upon a condition, which condition may be express or implied, precedent or subsequent. I say this because in argument it was suggested that there had been a breach of trust; but I can see no breach of trust in the executors having paid over this money upon a condition subsequent. They might well have thought that the scheme would be carried into effect; now that it has totally failed, they are entitled, in my opinion, to have the money back again.

We decide this case simply upon the construction of this particular will as applied to the circumstances of this particular case, and I cannot bring myself to doubt that there is nothing here approaching a general charitable purpose, but that the gift is a gift for the particular institute contingent upon the birth of that institute.

KENNEDY L.J. I am of the same opinion. Speaking for myself, I adopt the statement of the question in reference to the general law as it is put in Theobald on Wills, 7th ed. at p. 373: "If the gift is for a charitable purpose, the question is, is the testator's intention to promote some specific and well-defined purpose and that only, or is there a general charitable intention, which the testator wishes to carry out in a particular way." Here there is no doubt that the gift was for a charitable purpose; and it seems equally clear—and but for the argument addressed to us I should have thought it impossible to argue otherwise—that the testator's intention in making this gift, as well as the intention of every subscriber to the fund, was for the specific and well-defined purpose of the Institute of Medical Sciences being founded, and for no general or other purpose whatever. The giving of the money to a fund, as it was called, was really a gift for the foundation of the institute; directly that foundation was abandoned the whole purpose of the specific gift, as it seems to

C. A. 1909

UNIVERSITY OF LONDON MEDICAL SCIENCES INSTITUTE FUND, *In re.* FOWLER *v.* ATTORNEY-GENERAL.

me, failed. So far as regards money actually paid over, those who received it are trustees for its repayment; so far as regards payments not yet made, they are not now to be made because before they were made the one specific object had been altogether abandoned.

Solicitors: *Solicitor to the Treasury*; *Russell-Cooke & Co.*; *Hollams, Son, Coward & Hawksley*; *Freshfields.*

W. J. B.

C. A. 1909

April 21.

In re GUTTA PERCHA AND INDIA RUBBER COMPANY OF TORONTO'S APPLICATIONS.

Trade Mark—Application to register—Similar Mark on Register—"Same goods or description of goods"—Calculated to deceive—Trade Marks Act, 1905 (5 *Edw.* 7, *c.* 15), *ss.* 11, 19.

The opponents were manufacturers of all sorts of indiarubber goods, except boots and shoes. They had registered in 1899 a trade mark, of which the distinctive part was a Maltese cross, in class 40, for "goods manufactured from indiarubber or gutta-percha not including dress shields or gussette webs." The applicants applied to register in class 38 two trade marks of which the distinctive feature was a Maltese cross, one for "boots and shoes made wholly or partly of indiarubber," the other for "indiarubber footwear included in this class but not including gaiters or leggings or any goods of a like kind." The applicants had used the marks in Canada on all kinds of indiarubber goods. They had done some business in England, but only in boots and shoes:—

Held, that the opponents' trade mark was for "the same description of goods" as the applicants' proposed marks and they were "calculated to deceive," and registration ought to be refused under s. 19 and also under s. 11 of the Trade Marks Act, 1905.

THIS was an application made in January, 1906, by the Gutta Percha and India Rubber Manufacturing Company of Toronto to register two trade marks in class 38, the one for "boots and shoes made wholly or partly of indiarubber" and the other for "indiarubber footwear included in this class but not including gaiters or leggings and not including any goods of a like kind to gaiters or leggings."

The two marks were not precisely alike, but the distinctive part of each mark was a Maltese cross, and the two were treated as one both in argument and in the judgments. The applicants carried

on a large business in Canada as manufacturers of all classes of rubber goods, and the trade marks were registered in Canada for all their rubber goods. Class 38 is defined as "articles of clothing, such as hats of all kinds, caps and bonnets, hosiery, gloves, boots and shoes, other ready-made clothing."

The application was opposed by the Leyland and Birmingham Rubber Company, Limited, who had had on the register since 1899, in class 40, a mark consisting of a Maltese cross, not identical with but resembling the applicants' proposed marks, for "goods manufactured from indiarubber and gutta-percha not included in other classes but not including dress shields or gussette webs and not including any goods of a like kind to any excluded goods."

Class 40 is defined as "goods manufactured from indiarubber and gutta-percha not included in other classes."

The opposing company were large manufacturers of all sorts of rubber goods, carrying on business in England. They did not as a fact manufacture or deal in boots or shoes.

It was proved that the applicants had done some business in England in goloshes and rubber-soled tennis shoes and sand shoes. They had apparently not done business in England in any other rubber goods, but declined to undertake not to sell other rubber goods, though they wished to confine the trade mark in England to boots and shoes.

The opposition was founded on ss. 11 and 19 of the Trade Marks Act, 1905. (1)

The registrar had rejected the application, and his decision had been affirmed by Neville J., from whom the applicants now appealed.

(1) Sect. 11: "It shall not be lawful to register as a trade mark or part of a trade mark any matter, the use of which would by reason of its being calculated to deceive or otherwise be disentitled to protection in a Court of justice, or would be contrary to law or morality, or any scandalous design."

Sect. 19: "Except by order of the Court or in the case of trade marks in use before the 13th day of August one thousand eight hundred and seventy-five, no trade mark shall be registered in respect of any goods or description of goods which is identical with one belonging to a different proprietor which is already on the register with respect to such goods or description of goods, or so nearly resembling such a trade mark as to be calculated to deceive."

C. A. 1909

GUTTA PERCHA AND INDIA RUBBER COMPANY OF TORONTO'S APPLICATIONS, *In re.*

Cozens-Hardy M.R.

register as a trade mark or part of a trade mark any matter, the use of which would by reason of its being calculated to deceive or otherwise be disentitled to protection in a Court of justice"; and s. 19, so far as it is material, is as follows: "Except by order of the Court . . . . no trade mark shall be registered in respect of any goods or description of goods which is identical with one belonging to a different proprietor which is already on the register with respect to such goods or description of goods, or so nearly resembling such a trade mark as to be calculated to deceive." Sect. 11 is independent of the existence of another mark on the register. Sect. 19 gives increased protection in the case of there being another mark on the register. The language of s. 19 is not very happy, for registration of a trade mark must be in respect of particular goods or classes of goods (see s. 8). On the other hand, it was apparently felt by the Legislature to be desirable, having regard to the fact that the classes, which are fifty in number, overlap to a considerable extent, not to limit the protection as was originally done to cases where an applicant applied to register in that class in which the opponent was already registered, but to give a wider protection. If it can be made out that the "description of goods" for which a mark is registered is substantially of the same character as that for which a new mark is proposed, the newcomer shall not be entitled to claim registration, except by leave of the Court, if it appears that the new mark so nearly resembles the old as to be calculated to deceive or, to use language which is to be found in many of the judgments, to create confusion. It has also been decided that the words "description of goods" are not to be read solely with reference to the class in which the registration is effected. "Description of goods" may be narrower than the whole class, but it may also be wider, in this sense, that it may include articles in a different class. The matter should be looked at from a business and commercial point of view, and if the Court is satisfied that the goods, although in different classes, are really the same description of goods, the opponent is entitled to claim the benefit of s. 19.

Now in the present case I feel no doubt that the registrar exercised his discretion in refusing registration most properly.

The evidence satisfies me that sales by the applicants of boots and shoes in this country have been on a very limited scale, and that confusion will certainly be produced if rubber goods, such as boots and shoes, bearing the applicants' Maltese cross, are exhibited for sale and sold in this country in rubber shops side by side with indiarubber goods, such as gaiters and leggings, bearing the opponents' Maltese cross. I think the applicants have chosen the Maltese cross to indicate the quality of their indiarubber. They stamp it on the indiarubber soles just in the same way as the opponents stamp their Maltese cross on indiarubber gaiters, leggings, or other articles. In my opinion this is not a case in which we ought to make an order under s. 19, permitting registration upon terms to be imposed under s. 21. The confusion which would be produced is so great that we ought to do that which Neville J. did, namely, to decline to make any order under s. 19.

It might be sufficient to say that the applicants have not discharged the burden which rests upon them to establish that "confusion," in the sense which I have indicated, will not be produced. But I am satisfied that confusion will be produced. I have not overlooked the fact that the opponents do not make boots and shoes. That is not a sufficient answer. Messrs. Bass did not make and had no intention of making rum, yet they were held entitled to object to the registration for rum of a mark resembling their mark for beer. The *Fruit Salt Case* (1) and the *Motricine Case* (2) really establish this proposition beyond dispute.

The appeal must be dismissed with costs.

Buckley L.J. I am of the same opinion. The respondents, the Leyland Company, have since the year 1899 been on the register for a mark which is substantially a Maltese cross in respect of certain goods manufactured from indiarubber and gutta-percha. The appellants, the Toronto Company, are desirous of having put upon the register a mark, not identical but very similar, in respect of other goods manufactured from india-rubber and gutta-percha, namely, indiarubber footwear, not

(1) 15 App. Cas. 252. (2) [1907] 2 Ch. 435.

C. A. 1909

GUTTA PERCHA AND INDIA RUBBER COMPANY OF TORONTO'S APPLICATIONS, *In re.*

Cozens-Hardy M.R.

register as a trade mark or part of a trade mark any matter, the use of which would by reason of its being calculated to deceive or otherwise be disentitled to protection in a Court of justice"; and s. 19, so far as it is material, is as follows: "Except by order of the Court . . . . no trade mark shall be registered in respect of any goods or description of goods which is identical with one belonging to a different proprietor which is already on the register with respect to such goods or description of goods, or so nearly resembling such a trade mark as to be calculated to deceive." Sect. 11 is independent of the existence of another mark on the register. Sect. 19 gives increased protection in the case of there being another mark on the register. The language of s. 19 is not very happy, for registration of a trade mark must be in respect of particular goods or classes of goods (see s. 8). On the other hand, it was apparently felt by the Legislature to be desirable, having regard to the fact that the classes, which are fifty in number, overlap to a considerable extent, not to limit the protection as was originally done to cases where an applicant applied to register in that class in which the opponent was already registered, but to give a wider protection. If it can be made out that the "description of goods" for which a mark is registered is substantially of the same character as that for which a new mark is proposed, the newcomer shall not be entitled to claim registration, except by leave of the Court, if it appears that the new mark so nearly resembles the old as to be calculated to deceive or, to use language which is to be found in many of the judgments, to create confusion. It has also been decided that the words "description of goods" are not to be read solely with reference to the class in which the registration is effected. "Description of goods" may be narrower than the whole class, but it may also be wider, in this sense, that it may include articles in a different class. The matter should be looked at from a business and commercial point of view, and if the Court is satisfied that the goods, although in different classes, are really the same description of goods, the opponent is entitled to claim the benefit of s. 19.

Now in the present case I feel no doubt that the registrar exercised his discretion in refusing registration most properly.

The evidence satisfies me that sales by the applicants of boots and shoes in this country have been on a very limited scale, and that confusion will certainly be produced if rubber goods, such as boots and shoes, bearing the applicants' Maltese cross, are exhibited for sale and sold in this country in rubber shops side by side with indiarubber goods, such as gaiters and leggings, bearing the opponents' Maltese cross. I think the applicants have chosen the Maltese cross to indicate the quality of their indiarubber. They stamp it on the indiarubber soles just in the same way as the opponents stamp their Maltese cross on indiarubber gaiters, leggings, or other articles. In my opinion this is not a case in which we ought to make an order under s. 19, permitting registration upon terms to be imposed under s. 21. The confusion which would be produced is so great that we ought to do that which Neville J. did, namely, to decline to make any order under s. 19.

It might be sufficient to say that the applicants have not discharged the burden which rests upon them to establish that "confusion," in the sense which I have indicated, will not be produced. But I am satisfied that confusion will be produced. I have not overlooked the fact that the opponents do not make boots and shoes. That is not a sufficient answer. Messrs. Bass did not make and had no intention of making rum, yet they were held entitled to object to the registration for rum of a mark resembling their mark for beer. The *Fruit Salt Case* (1) and the *Motricine Case* (2) really establish this proposition beyond dispute.

The appeal must be dismissed with costs.

BUCKLEY L.J. I am of the same opinion. The respondents, the Leyland Company, have since the year 1899 been on the register for a mark which is substantially a Maltese cross in respect of certain goods manufactured from indiarubber and gutta-percha. The appellants, the Toronto Company, are desirous of having put upon the register a mark, not identical but very similar, in respect of other goods manufactured from india-rubber and gutta-percha, namely, indiarubber footwear, not

(1) 15 App. Cas. 252. (2) [1907] 2 Ch. 435.

C. A. 1909

GUTTA PERCHA AND INDIA RUBBER COMPANY OF TORONTO'S APPLICATIONS, *In re.*

Buckley L.J.

including gaiters or leggings and not including goods of a like kind.

The first question for decision is whether s. 19 of the Act of 1905 applies to this case. In my opinion it does. Sect. 8 speaks of "classes of goods," while s. 19 speaks of "description of goods." At first sight it would look as if the word "description" in s. 19 is used in the same sense as "class" in s. 8, because s. 19 vetoes registration of a mark in respect of any "description of goods," and inasmuch as it could only be registered under s. 8 for goods or a class of goods, that would lead to the conclusion that "description" means "class." I am convinced that that view of the Act of Parliament is wrong. The Act of 1875 differed. The section of that Act which corresponded to s. 8 of the Act of 1905 was s. 2, and it uses the same words as the Act of 1905. A trade mark must be registered as belonging to particular goods or classes of goods. Sect. 6 of the Act of 1875, corresponding to s. 19 of the Act of 1905, ran, "The registrar shall not, without the special leave of the Court, to be given in the prescribed manner, register in respect of the same goods or classes of goods," using the word "class" again. That was altered in the Act of 1883. Sect. 72 of that Act says that "the comptroller shall not register in respect of the same goods or description of goods," and these words have been retained in the Act of 1905. In my opinion the alteration was made designedly. The purpose of it was this—that where the goods are not of the same class, but are of the same description, taking, as an instance, goods made of indiarubber, then the intention of the Acts of 1883 and of 1905 is that there shall be a veto in respect of registering an identical mark, or a similar mark, in respect of goods falling within the description, as distinguished from the class. Sect. 19 is perfectly capable of being read, and is, I think, to be read, as if it ran thus: No trade mark shall be registered in respect of any class of goods falling within a particular description of goods when an identical or similar mark is already on the register in respect of any goods falling within that description. It is true that a man cannot register for a description of goods, but he can register for a class of goods which fall within a particular description, and that is, I think, what s. 19 was aimed

at. Now here the Leyland Company were on the register for the Maltese cross in respect of indiarubber goods, which is a description of goods. The applicants seek to be put upon the register in respect of the same or a similar mark for other goods which I agree are different goods, but which are of the same description, namely, indiarubber goods. In that state of facts I think s. 19 applies.

The next question is this. Sect. 19 being applicable, it is competent to the Court, nevertheless, to allow the mark to be put upon the register, but it is then necessary to consider whether it is a mark so nearly resembling the mark already on as to be calculated to deceive. Now it seems to me that if the applicants registered their trade mark it would be calculated to deceive, or might be calculated to deceive, in either one of two respects. It might lead to the belief that the Leyland Company, who hitherto had not made boots and shoes, had entered the boot and shoe trade, and that the boot which is offered with the Maltese cross mark is of their make; or it may lead to the belief—and perhaps this is the more pertinent one—that the mark indicates the quality of the rubber, and that the boots which are stamped with the Maltese cross, the Leyland mark, are made with rubber for the quality of which the Leyland Company are responsible.

There is a further matter in which I think there may be deception. It has been shewn to us by an invoice which we have seen that the applicants, the Toronto Company, as is natural and proper, head their invoices with a statement of all the various goods which they sell, tubing and various things—not boots and shoes merely—manufactured rubber in a great variety of forms, and at the head of their invoice they put as their trade mark this Maltese cross. In this country that is not their trade mark for their general rubber trade; it is only their trade mark for a department of their rubber trade, namely, the making of boots and shoes; but putting forward their trade mark in that form might very easily lead to the result that parties seeing that mark, and knowing that the Leyland Company make indiarubber, would assume that the other goods supplied by the Toronto Company, tubing or whatever it may be, were goods which were supplied by the Leyland Company. I am satisfied here that, although the

C. A. 1909

GUTTA PERCHA AND INDIA RUBBER COMPANY OF TORONTO'S APPLICATIONS, *In re.*

Buckley L.J.

including gaiters or leggings and not including goods of a like kind.

The first question for decision is whether s. 19 of the Act of 1905 applies to this case. In my opinion it does. Sect. 8 speaks of "classes of goods," while s. 19 speaks of "description of goods." At first sight it would look as if the word "description" in s. 19 is used in the same sense as "class" in s. 8, because s. 19 vetoes registration of a mark in respect of any "description of goods," and inasmuch as it could only be registered under s. 8 for goods or a class of goods, that would lead to the conclusion that "description" means "class." I am convinced that that view of the Act of Parliament is wrong. The Act of 1875 differed. The section of that Act which corresponded to s. 8 of the Act of 1905 was s. 2, and it uses the same words as the Act of 1905. A trade mark must be registered as belonging to particular goods or classes of goods. Sect. 6 of the Act of 1875, corresponding to s. 19 of the Act of 1905, ran, "The registrar shall not, without the special leave of the Court, to be given in the prescribed manner, register in respect of the same goods or classes of goods," using the word "class" again. That was altered in the Act of 1883. Sect. 72 of that Act says that "the comptroller shall not register in respect of the same goods or description of goods," and these words have been retained in the Act of 1905. In my opinion the alteration was made designedly. The purpose of it was this—that where the goods are not of the same class, but are of the same description, taking, as an instance, goods made of indiarubber, then the intention of the Acts of 1883 and of 1905 is that there shall be a veto in respect of registering an identical mark, or a similar mark, in respect of goods falling within the description, as distinguished from the class. Sect. 19 is perfectly capable of being read, and is, I think, to be read, as if it ran thus: No trade mark shall be registered in respect of any class of goods falling within a particular description of goods when an identical or similar mark is already on the register in respect of any goods falling within that description. It is true that a man cannot register for a description of goods, but he can register for a class of goods which fall within a particular description, and that is, I think, what s. 19 was aimed

at. Now here the Leyland Company were on the register for the Maltese cross in respect of indiarubber goods, which is a description of goods. The applicants seek to be put upon the register in respect of the same or a similar mark for other goods which I agree are different goods, but which are of the same description, namely, indiarubber goods. In that state of facts I think s. 19 applies.

The next question is this. Sect. 19 being applicable, it is competent to the Court, nevertheless, to allow the mark to be put upon the register, but it is then necessary to consider whether it is a mark so nearly resembling the mark already on as to be calculated to deceive. Now it seems to me that if the applicants registered their trade mark it would be calculated to deceive, or might be calculated to deceive, in either one of two respects. It might lead to the belief that the Leyland Company, who hitherto had not made boots and shoes, had entered the boot and shoe trade, and that the boot which is offered with the Maltese cross mark is of their make; or it may lead to the belief—and perhaps this is the more pertinent one—that the mark indicates the quality of the rubber, and that the boots which are stamped with the Maltese cross, the Leyland mark, are made with rubber for the quality of which the Leyland Company are responsible.

There is a further matter in which I think there may be deception. It has been shewn to us by an invoice which we have seen that the applicants, the Toronto Company, as is natural and proper, head their invoices with a statement of all the various goods which they sell, tubing and various things—not boots and shoes merely—manufactured rubber in a great variety of forms, and at the head of their invoice they put as their trade mark this Maltese cross. In this country that is not their trade mark for their general rubber trade; it is only their trade mark for a department of their rubber trade, namely, the making of boots and shoes; but putting forward their trade mark in that form might very easily lead to the result that parties seeing that mark, and knowing that the Leyland Company make indiarubber, would assume that the other goods supplied by the Toronto Company, tubing or whatever it may be, were goods which were supplied by the Leyland Company. I am satisfied here that, although the

C. A. 1909 HOWARTH, *In re.* HOWARTH *v.* MAKINSON.

E. S. S. Martin, to be payable by weekly instalments, but otherwise in terms precisely similar to those of the gift to M. A. Makinson, "and subject to the aforesaid annuities" the testator directed that the trustee should hold the said moneys to arise and be received as aforesaid upon trust for his said brother, George Howarth, absolutely, and in the event of George Howarth's death in the testator's lifetime, then "subject to the aforesaid annuities" upon trust for George Howarth's issue living at the testator's death.

The testator died on September 27, 1887. George Howarth died on June 26, 1889, having, by his will, appointed the plaintiffs executors and trustees thereof. The will was proved by all the executors, who had ever since acted as trustees of the will of William Howarth.

Since June 30, 1906, the income of the testator's estate had been insufficient to keep down the three annuities, which had fallen into arrear to the extent of 147*l.* odd.

The plaintiffs accordingly took out a summons against the annuitants for the determination of the question whether the several annuities were a charge upon the corpus or only upon the income for the time being of the testator's estate, and whether the said annuitants were entitled to have the arrears of their respective annuities and the deficiency between the income of the testator's estate and the amount of the said annuities raised out of his estate.

Joyce J. held, following *Booth* v. *Coulton* (1) that the annuities were a continuing charge upon the income of the estate until they were paid in full.

The defendants appealed, and there was a cross-appeal by the plaintiffs.

Younger, K.C., and *Ernest Radford*, for the defendants. These annuities are a charge upon corpus, first, because there is an indefinite gift out of income, and, secondly, by reason of the terms of the gift over—"subject to the aforesaid annuities." Joyce J. has held on the authority of *Booth* v. *Coulton* (1) that these annuities are a continuing charge upon income, but in that

(1) (1870) L. R. 5 Ch. 684.

case the words of the gift over were different, and an argument was founded upon that. Upon the cross-appeal *Phillips* v. *Gutteridge* (1) is conclusive. There the gift was almost identical with the gift in the present case, and the principle there laid down by Lord Westbury applies.

Hughes, K.C., and *Clarkson*, for the plaintiffs. We submit that these annuities are a charge only upon the income for the time being of the testator's estate, but if the Court should not be of that opinion, we do not dispute that they are a charge upon the corpus. "Subject to the annuities aforesaid" is equivalent to "subject to the trusts aforesaid," i.e., subject to the annuities payable out of income in manner aforesaid. This case therefore falls within the principle of *In re Boden*. (2) In *Phillips* v. *Gutteridge* (1) there was not in terms any gift out of income, and therefore the passage in Lord Westbury's judgment relied on by the defendants is dictum only. Moreover, in the very similar case of *Foster* v. *Smith* (3) Lord Lyndhurst held that the annuity was a charge on income only. In *Birch* v. *Sherratt* (4), where the words of the gift over were far stronger than in this case, Lord Cairns thought that but for those words the annuity would have been payable merely out of the income for the time being. All those cases are discussed by the Court of Appeal in *In re Boden*. (2)

[COZENS-HARDY M.R. referred to *Ex parte Wilkinson*. (5)]

COZENS-HARDY M.R. In my opinion the appeal is right, because upon the language of this will the annuity is not merely a continuing charge upon the rents and profits, but is a charge upon corpus. The principle, so far as one can extract it from the cases, which are very numerous, is that if you find a trust to pay out of income an annuity, and nothing either in the express terms of the will or upon construction to determine the time during which the income available for payment of the annuity is limited, then it may be a continuing charge. A mere trust for the payment of an annuity is not necessarily a trust to pay the annuity only out of income

(1) (1862) 3 D. J. & S. 332.
(2) [1907] 1 Ch. 132.
(3) (1845) 1 Ph. 629.
(4) (1867) L. R. 2 Ch. 644.
(5) (1849) 3 De G. & Sm. 633.

C. A. 1909 — HOWARTH, *In re.* HOWARTH *v.* MAKINSON.

E. S. S. Martin, to be payable by weekly instalments, but otherwise in terms precisely similar to those of the gift to M. A. Makinson, "and subject to the aforesaid annuities" the testator directed that the trustee should hold the said moneys to arise and be received as aforesaid upon trust for his said brother, George Howarth, absolutely, and in the event of George Howarth's death in the testator's lifetime, then "subject to the aforesaid annuities" upon trust for George Howarth's issue living at the testator's death.

The testator died on September 27, 1887. George Howarth died on June 26, 1889, having, by his will, appointed the plaintiffs executors and trustees thereof. The will was proved by all the executors, who had ever since acted as trustees of the will of William Howarth.

Since June 30, 1906, the income of the testator's estate had been insufficient to keep down the three annuities, which had fallen into arrear to the extent of 147*l.* odd.

The plaintiffs accordingly took out a summons against the annuitants for the determination of the question whether the several annuities were a charge upon the corpus or only upon the income for the time being of the testator's estate, and whether the said annuitants were entitled to have the arrears of their respective annuities and the deficiency between the income of the testator's estate and the amount of the said annuities raised out of his estate.

Joyce J. held, following *Booth* v. *Coulton* (1) that the annuities were a continuing charge upon the income of the estate until they were paid in full.

The defendants appealed, and there was a cross-appeal by the plaintiffs.

Younger, K.C., and *Ernest Radford*, for the defendants. These annuities are a charge upon corpus, first, because there is an indefinite gift out of income, and, secondly, by reason of the terms of the gift over—"subject to the aforesaid annuities." Joyce J. has held on the authority of *Booth* v. *Coulton* (1) that these annuities are a continuing charge upon income, but in that

(1) (1870) L. R. 5 Ch. 684.

case the words of the gift over were different, and an argument was founded upon that. Upon the cross-appeal *Phillips* v. *Gutteridge* (1) is conclusive. There the gift was almost identical with the gift in the present case, and the principle there laid down by Lord Westbury applies.

Hughes, K.C., and *Clarkson*, for the plaintiffs. We submit that these annuities are a charge only upon the income for the time being of the testator's estate, but if the Court should not be of that opinion, we do not dispute that they are a charge upon the corpus. "Subject to the annuities aforesaid" is equivalent to "subject to the trusts aforesaid," i.e., subject to the annuities payable out of income in manner aforesaid. This case therefore falls within the principle of *In re Boden*. (2) In *Phillips* v. *Gutteridge* (1) there was not in terms any gift out of income, and therefore the passage in Lord Westbury's judgment relied on by the defendants is dictum only. Moreover, in the very similar case of *Foster* v. *Smith* (3) Lord Lyndhurst held that the annuity was a charge on income only. In *Birch* v. *Sherratt* (4), where the words of the gift over were far stronger than in this case, Lord Cairns thought that but for those words the annuity would have been payable merely out of the income for the time being. All those cases are discussed by the Court of Appeal in *In re Boden*. (2)

[COZENS-HARDY M.R. referred to *Ex parte Wilkinson*. (5)]

COZENS-HARDY M.R. In my opinion the appeal is right, because upon the language of this will the annuity is not merely a continuing charge upon the rents and profits, but is a charge upon corpus. The principle, so far as one can extract it from the cases, which are very numerous, is that if you find a trust to pay out of income an annuity, and nothing either in the express terms of the will or upon construction to determine the time during which the income available for payment of the annuity is limited, then it may be a continuing charge. A mere trust for the payment of an annuity is not necessarily a trust to pay the annuity only out of income

(1) (1862) 3 D. J. & S. 332.
(2) [1907] 1 Ch. 132.
(3) (1845) 1 Ph. 629.
(4) (1867) L. R. 2 Ch. 644.
(5) (1849) 3 De G. & Sm. 633.

C. A. 1909 HOWARTH, *In re.* HOWARTH *v.* MAKINSON. Cozens-Hardy M.R.

accruing during the life of the annuitant. If, however, you find a trust to pay out of income with no such limit as I have suggested, and then a disposition of the estate subject to the annuity, that charges the annuity upon the corpus of the estate just as much as a gift of real estate subject to the payment of the testator's debts charges the debts upon the real estate. This case seems to me to be covered by authority as far as such a case can be. The case of *Ex parte Wilkinson* (1) appears to me to be identical with it. *Phillips* v. *Gutteridge* (2) lays down a rule which I am not disposed to depart from, even if it were competent for me to do so, and I think that there is nothing in *In re Boden* (3) which is inconsistent with the view I have taken, namely, that this is not a charge limited to income accruing during the lifetime of the annuitant, and that it is not merely a continuing charge upon income, but is a charge upon the corpus. I think that the order of the Court below must be varied in that sense.

BUCKLEY L.J. This testator directed a conversion of all his estate and then gave annuities out of income, and "subject to the aforesaid annuities" he gave his estate to his brother absolutely. There was no life estate or other limited estate. What is meant by the words "subject to the aforesaid annuities"? In my opinion they mean not "subject to the payment of the annuities out of income as aforesaid," but "subject to the payment and satisfaction of certain annual sums." It is not necessary to discuss what was the previous trust for payment of the annuities, because, whatever that trust was, the property is given over not subject to that trust, but subject to the annuities. The annuities are to be satisfied first, and then the residuary legatee is to get the fund. I am therefore of opinion that these annuities are charged upon corpus.

KENNEDY L.J. It seems to me that the authorities are rather in favour of the construction contended for by the appellants than in favour of that contended for by the respondents. I

(1) 3 De G. & Sm. 633. (2) 3 D. J. & S. 332.
(3) [1907] 1 Ch. 132.

therefore agree that the declaration should be varied in the manner suggested.

C. A. 1909 HOWARTH, *In re.* HOWARTH *v.* MAKINSON.

Solicitors: *Rooke & Sons, for Wm. Eaton, Manchester.*

H. B. H.

BELLERBY *v.* HEYWORTH.

C. A. 1909 *May* 21.

[1909 B. 620.]

Dentist—Unregistered Person—Description—"Specially qualified to practise dentistry"—Dentists Act, 1878 (41 & 42 *Vict.* c. 33), *s.* 3.

By the Dentists Act, 1878, s. 3, "A person shall not be entitled to take or use the name or title of 'dentist' (either alone or in combination with any other word or words), or of 'dental practitioner,' or any name, title, addition, or description implying that he is registered under this Act or that he is a person specially qualified to practise dentistry, unless he is registered under this Act":—

Held, that the description forbidden by the section is a description of the person as distinguished from a description of the acts done by the person, and that the section does not prohibit an unregistered person from announcing that he does dental work provided that he does not say that he does so as a dentist or use any description of himself implying that he is specially qualified to practise as a dentist.

Therefore, where certain unregistered persons became partners in the business of the extraction and manipulation of teeth and two of the three partners affixed to the partnership premises a notice containing the names of the partners followed by the words "Finest Artificial Teeth. Painless Extraction. Advice Free":—

Held, that they had not committed an offence under s. 3 of the Act.

Whether the words "specially qualified" in s. 3 are limited to the statutory qualifications mentioned in s. 6 *quære.*

Barnes v. *Brown*, [1909] 1 K. B. 38, overruled.

The principle of *Emslie* v. *Paterson*, (1897) 24 R. (Just. Cas.) 77, approved.

APPEAL from a decision of Parker J.

By articles of partnership under seal dated February 1, 1909, and made between the plaintiff James Bellerby of the first part, the defendant Joseph Heyworth of the second part, and the defendant William Forest Bowen of the third part, the plaintiff and defendants became partners in the business of "the extraction and adaptation of teeth" for the term of one year from the date of the articles.

C. A. 1909 BELLERBY v. HEYWORTH.

Clause 10 of the articles provided as follows: "If at any time during the continuance of this business any of" the partners "shall take or use in any way whatever any name title addition or description or otherwise do anything which shall be an offence and in contravention of the Dentists Act 1878 or Medical Act 1886 or any statute regulating the profession or practice of dentists in the United Kingdom then and in such case the other or others of the said partners may by notice in writing given to the partner or partners so acting in contravention as aforesaid determine the partnership as regards such last-mentioned partner or partners whereupon the said partnership shall cease and determine accordingly."

On February 9, 1909, the defendants fixed upon the partnership premises the following notice:—

"Bellerby, Heyworth & Bowen.
"Finest Artificial Teeth. Painless Extraction.
"Advice Free. Mr. Heyworth attends here."

The plaintiff objected that this notice was a contravention of s. 3 of the Dentists Act, 1878, on the ground that none of the partners was registered as a dentist pursuant to that Act, nor was any of them a legally qualified medical practitioner, but the defendants declined to withdraw the notice. Accordingly on February 12, 1909, the plaintiff gave the defendants notice in writing under clause 10 putting an end to the partnership. The defendants denied that the notice of February 9 constituted a breach of clause 10. Thereupon the plaintiff brought an action against the defendants for a declaration that the partnership was duly dissolved by the notice served by him on February 12.

Parker J., upon the authority of *Barnes* v. *Brown* (1), made the declaration asked for by the plaintiff.

The defendants appealed.

Alexander Grant, K.C., and *Grimwood Mears*, for the appellants. The question is what is the meaning of the words "specially qualified" in s. 3 of the Dentists Act, 1878, as amended by the

(1) [1909] 1 K. B. 38.

Medical Act, 1886. (1) The amendment is not material for the present purpose. It is submitted that the term "qualification" in the Act of 1878 and in the cognate Acts relating to other professions means possessing the statutory title to registration which is given by the particular Act relating to the profession, and does not mean possessing skill and experience as a practitioner. In *Barnes* v. *Brown* (2) the Divisional Court adopted the popular as opposed to the technical meaning of "qualification," and this is really an appeal from that decision. The term was used in its technical sense in the Medical Act, 1858, which is the foundation of all the later statutes on this subject. The object of that Act, as recited in the preamble, was to enable persons "to distinguish qualified from unqualified practitioners," and the meaning to be attributed to "qualified" and "qualification" appears from ss. 7, 15, 20, 21, 30, 34, and 40, which shew that those terms have no signification except as applicable to a man possessing the statutory title to registration on the Medical Register. That Act did not prevent an unqualified person from practising, but it disentitled him from recovering any fees in a Court of law.

[BUCKLEY L.J. referred to *Davies* v. *Makuna*. (3)]

That case seems to shew that under the Medical Acts a man may not practise medicine, but he may practise surgery. Under the Dentists Act, 1878, it is not disputed that anybody may

(1) The Dentists Act, 1878, s. 3, provides:

"A person shall not be entitled to take or use the name or title of 'dentist' (either alone or in combination with any other word or words), or of 'dental practitioner,' or any name, title, addition, or description implying that he is registered under this Act or that he is a person specially qualified to practise dentistry, unless he is registered under this Act.

"Any person who . . . . not being registered under this Act, takes or uses any such name, title, addition, or description as aforesaid, shall be liable, on summary conviction, to a fine not exceeding twenty pounds; provided that nothing in this section shall apply to legally qualified medical practitioners."

The Medical Act, 1886, s. 26, provides:

"It is hereby declared that the words 'title, addition, or description,' where used in the Dentists Act, 1878, include any title, addition to a name, designation, or description, whether expressed in words or by letters, or partly in one way and partly in the other."

(2) [1909] 1 K. B. 38.

(3) (1885) 29 Ch. D. 596.

C. A. 1909 BELLERBY v. HEYWORTH.

practise dentistry. Looking at the preamble of that Act, which, though repealed by the Statute Law Revision Act, 1894, may still be referred to, the object of the Act is stated to be to make provision "for the registration of persons specially qualified to practise as dentists in the United Kingdom." It is submitted that the words "specially qualified" in s. 3 must be interpreted by reference to the preamble, and that the preamble must be interpreted by reference to s. 6, which shews that those words are used in the limited sense of possessing the statutory title to registration. They were not intended to prevent an unqualified practitioner from saying that he possessed skill and experience so long as he did not call himself a dentist or a dental practitioner or use any term implying that he was registered or had the statutory qualifications of a dentist. The term "qualification" in the Dentists Act refers to the holding of certain diplomas or degrees which the council recognize as entitling to registration: see ss. 4, 5, 7, 10, 18, 27; and the use of the term "specially qualified" is due to the fact that s. 6 prescribes two alternative qualifications, one that the practitioner should hold the necessary degrees, the other that he should have been bona fide engaged in practice as a dentist at the passing of the Act. It follows that the term "specially qualified" does not necessarily involve any special knowledge or skill.

[BUCKLEY L.J. The question is whether the words in s. 3 do not include more than the words in the preamble.]

That is a penal section and the language must be construed strictly. The Act creates a special class of dentists, and the protection provided by s. 3 exactly covers s. 6 and no more. Further, the description aimed at in s. 3 means a description personal to the individual himself and ejusdem generis with the preceding words of the section, and not a mere description of the man's work. But in this case, as in *Barnes* v. *Brown* (1), the description relates solely to the work and not to the individual and does not suggest the holding of a degree or licence. *Barnes* v. *Brown* (1) is contrary to the decision of the Justiciary Court in Scotland in *Emslie* v. *Paterson* (2), which is a strong authority in the appellants' favour. The Divisional Court relied upon two

(1) [1909] 1 K. B. 38. (2) 24 R. (Just. Cas.) 77.

decisions of the same Court under the Veterinary Surgeons Act, 1881, the penal clause of which (s. 17) is practically identical with the penal clause in this Act, but the preamble is different. In *Royal College of Veterinary Surgeons* v. *Robinson* (1) it was held that the defendant, who called his place of business a "veterinary forge," had committed an offence against that Act. *Royal College of Veterinary Surgeons* v. *Collinson* (2), where the words were "canine specialist," was decided solely on the authority of *Royal College of Veterinary Surgeons* v. *Robinson* (1), which the Court thought was wrong, and in that case there was no argument for the respondent. In the circumstances those cases are not conclusive against the appellants. In *Panhaus* v. *Brown* (3), which was a decision under the Dentists Act, the point was not argued, but was assumed, and there was there the use of the word "registered." That case is therefore distinguishable.

W. F. Hamilton, K.C., and *Gatey*, for the respondent. The words "specially qualified" in s. 3 are not limited to the qualifications mentioned in s. 6 and are not controlled by the preamble, but they include qualification in the ordinary sense of having special skill or knowledge in the profession. The preamble cannot control the enacting part of a statute, any more than a recital can control the operative part of a deed, where the latter is clear, and there is no ambiguity in s. 3. No reliance can be placed upon decisions under other Acts where the language was different. It is said that the words are limited to personal qualification, but where a dentist puts up a notice containing the words "painless extraction" he is holding out to the public that he is specially qualified to undertake the work which he promises to do. It is not necessary to say that *Emslie* v. *Paterson* (4) was not rightly decided, since it is distinguishable, as explained by the Divisional Court. *Panhaus* v. *Brown* (3) is an authority in the respondent's favour.

COZENS-HARDY M.R. This is in form an appeal from a decision of Parker J., but it is in reality an appeal from a decision of the Divisional Court in a case heard last October, *Barnes* v.

(1) [1892] 1 Q. B. 557.
(2) [1908] 2 K. B. 248.
(3) (1904) 68 J. P. 435.
(4) 24 R. (Just. Cas.) 77.

C. A. 1909 BELLERBY v. HEYWORTH. Cozens-Hardy M.R.

Brown (1), and undoubtedly it raises a point of importance as to the true meaning and effect of the Dentists Act, 1878. I start with this, which I think is not really disputed, that there is nothing in the Dentists Act which prevents a man from doing dentists' work. It is not wrong under that Act for any man to do dentists' work, and it is not wrong for him to inform the public that he does that which it is lawful for him to do. But the Act, for the protection of dentists, enacted in short this: that there should be a register for dentists which should include British dentists, colonial dentists, and foreign dentists, all of whom might get on the register if they satisfied the requirements of the Act. As regards British dentists practising prior to 1878 no test of their knowledge was required; the mere fact that they had extracted a tooth before 1878 entitled them to be on the register. As regards those commencing to practise after 1878 the Act required them to comply with certain special qualifications, and as regards colonial or foreign dentists they had to satisfy the General Council of Medical Education that they possessed certain degrees or diplomas which in the view of the council were an adequate guarantee of their skill. Having done that, Parliament in s. 3 said in effect this: Although any man may act as a dentist he shall not call himself a dentist, or use any words implying that he is a person specially qualified to do the work of a dentist, unless he is registered under the Act. The precise language of the section is as follows: [His Lordship read the section.]

As I read that section it is directed to the personal description of the man as distinguished from the description of the work which the man does. I do not propose here, because I do not think it is necessary, to express an opinion as to the precise effect to be given to those words "specially qualified." In my view that matter does not arise for decision. What have the defendants done? The defendants were in partnership with the plaintiff, and the defendants put upon the partnership premises this notice and nothing more: "Bellerby, Heyworth & Bowen." Those are the names of the plaintiff and the two defendants. "Finest Artificial Teeth. Painless Extraction. Advice Free.

(1) [1909] 1 K. B. 38.

Mr. Heyworth attends here." I ask myself, is there anything in that which is taking or using the name or title of "dentist," or "dental practitioner," or any name, title, addition, or description implying that these gentlemen are registered under the Act or that they are persons specially qualified to practise dentistry although not in fact registered under the Act. In my opinion there is not. I desire to adopt the language of the Lord Justice-Clerk in the case of *Emslie* v. *Paterson* (1) where he said: "If the appellant can without any breach of the criminal law extract teeth and put in false teeth, or the like, I can see nothing in the statute forbidding him from announcing that he does so, which is just announcing that he practises dentistry. The Act strikes at his asserting that he has 'special' qualification for doing so, and whatever that may mean, I am unable to hold that the use of the words 'American Dentistry' in connection with his name, or calling his place of business a 'Dental Office,' can be held to be taking or using a name or title, addition, or description implying that he has a 'special' qualification, as distinguished from an assertion that he is qualified." I will also read a passage from the judgment of Lord Moncreiff where he says: "The signboard and plate mentioned in the complaint bear the inscriptions 'American Dentistry,' 'A. Emslie,' and 'Dental Office.' They do no more than notify that dentistry is carried on within: they contain no profession of the qualifications of the practitioner, and the plate does not assert that the appellant is the operator." That seems to me to be the true meaning and effect of this s. 3 of the Act. I have thus far refrained from criticizing or commenting upon the judgment in *Barnes* v. *Brown*. (2) It is needless to say that I have considered what was said by the Lord Chief Justice and Bigham J. in that case with the utmost respect, but I must confess that I am unable to follow the reasoning in that case—reasoning which seems to me to go the length of saying that people must not announce that they do that which by law they are entitled to do, and that by saying that they do, and do well, that which the law entitles them to do they are necessarily infringing the Act. I can find no such personal description, either expressed or implied, in

(1) 24 R. (Just. Cas.) 77, 81.

(2) [1909] 1 K. B. 38.

C. A. 1909 BELLERBY v. HEYWORTH.

what has been done here as brings the case within the section. Therefore, with great deference to the Divisional Court, I prefer the view taken by the Scottish Court, and I think that that decision ought to be followed in preference to *Barnes* v. *Brown*. (1) It follows that this appeal must be allowed and the action dismissed.

BUCKLEY L.J. As regards the practice of medicine, that is to say, the dispensing of medicine, giving medical advice, and attending to the sick as medical adviser, the effect of the statute 55 Geo. 3, c. 194, and the Medical Act, 1858, is that the unqualified person is prevented from practising as a medical practitioner. As regards dentists that is not so. Any one may practise as a dentist, any one may extract a tooth or perform a dental operation. What the Dentists Act does is to forbid a person who does practise dentistry from calling himself by certain names unless he satisfies certain qualifications mentioned in the Act of Parliament. The Dentists Act, 1878, commences with a recital that "it is expedient that provision be made for the registration of persons specially qualified to practise as dentists in the United Kingdom," and s. 6 details the particular qualifications required of those who are to be entitled to be registered under the Act of Parliament, so that, no doubt, in the language of the Act of 1878, the persons indicated in s. 6 are persons who are in the preamble spoken of as persons specially qualified to practise. But when in s. 3 I find that a person practising dentistry is forbidden from using certain names and titles or any name or title implying that he is a person specially qualified to practise dentistry, I am not, as at present advised, prepared to say that those words bear the same limited meaning. It is not necessary for the purposes of this case to decide whether persons specially qualified as mentioned in s. 3 must necessarily be persons falling within s. 6. As at present advised I think they need not. It would be very difficult to say that if a person put up a brass plate on his door, "Mr. A. B., a person specially qualified to practise dentistry, attends here daily to perform dental operations," he would not fall within the Act of Parliament.

(1) [1909] 1 K. B. 38.

The argument presented to us on behalf of the appellants would involve that result. In the present case it is unnecessary to decide it and I say nothing more about it. But then the second point is that by s. 3 a man is forbidden to call himself certain things: he must not call himself a dentist; he must not call himself a dental practitioner; he must not (reading the section with the alteration made in 1886) take or use any name, title, addition to a name, designation or description, whether expressed in words or by letters, or partly in one way or partly in the other, implying that he is registered under the Act or that he is a person specially qualified to practise dentistry, unless he is registered. Now in reading those words it is to be observed that they are confined to forbidding descriptions of the person as distinguished from descriptions of the acts to be done by the person. It may be that this section would cover the case of a man using an addition to his name which in terms has reference to acts but is in reality a description of himself as a specially qualified person; it is difficult to draw the line and say where a description by reference to acts ends and a description of the person begins. For instance, suppose a man used words representing that by reason of long experience he did the act exceptionally well, it may be that would be a description of himself as a person who was qualified in a particular way. But, subject to that difficulty in drawing the line, I feel no doubt in laying it down as a general proposition that what this section forbids is a description of the person as distinguished from a description of the acts done. Applying that to this case, I cannot find here that there is any description of the person at all as being a dentist or a dental practitioner or a person qualified to practise dentistry. I find here a name and then "Finest Artificial Teeth." That means, I suppose, that he either makes them or sells them. He may buy them, sell them, or fit them, but it is some operation or transaction in respect of artificial teeth. Then we have "Painless Extraction"—an act which he does or says he does; "Advice Free"—a statement that he gives advice and makes no charge for it. These are all simply statements of acts done, and not descriptions of the person as a person qualified to do the acts. I read from the

C. A. 1909 BELLERBY v. HEYWORTH. Buckley L.J.

argument in *Barnes* v. *Brown* (1) this, which commands my assent. Mr. Danckwerts, who argued the case for the appellants, said, "If the construction contended for by the respondent prevails, a notification that 'teeth are extracted' will come within the section, because it implies that the person of whom it is stated is specially qualified to extract teeth. This would practically prevent a person who is entitled to practise dentistry from saying that he practised it." Mr. Gatey's argument really went that length. He said, "If a man says 'I do an act' he is to be taken to say 'and mark you I am a person particularly qualified to do the act.'" I do not think it follows at all. It seems to me that if, as the defendants have done in this case, they simply state acts, which they are prepared to do, they are not within s. 3 implying that they are qualified to do the acts which they say they are prepared to do. Three cases before the Divisional Court have been cited to us. I think it unnecessary to say whether those cases were rightly decided or not. They are all distinguishable from the present. The first is *Royal College of Veterinary Surgeons* v. *Robinson*. (2) There the words were "veterinary forge." If you can evolve out of those words the meaning that there was a forge attended by a person who was entitled to call himself a veterinary surgeon, the case may have been right. I do not say whether it was right or wrong. In the second case, *Royal College of Veterinary Surgeons* v. *Collinson* (3), the words were "canine specialist." That is directly a description of the person. The defendant had taken upon himself to affirm that he was a specialist in what, having regard to the context, was plainly canine disease. If a man calls himself a specialist he means it to be inferred that he is specially qualified in the matter in which he says he is a specialist. The third, *Panhaus* v. *Brown* (4), seems to me easy. A man called himself by the alias "German Dental Institute," and all that the Lord Chief Justice said was, "He says he is a dentist; he has called himself a dentist under the phrase 'German Dental Institute.'" The case of *Emslie* v. *Paterson* (5) is one which I think is very pertinent to the present,

(1) [1909] 1 K. B. 38, 43.
(2) [1892] 1 Q. B. 557.
(3) [1908] 2 K. B. 248.
(4) 68 J. P. 435.
(5) 24 R. (Just. Cas.) 77.

and with the reasoning of the learned judges there I entirely concur. Whether it would be possible out of the words "American dentistry," "Dental Office," to evolve the idea that it was an office attended by persons who were calling themselves dentists I will not say. If so, the decision might have been different; but the argument did not take that form. I think that the passage which the Master of the Rolls has read in the Lord Justice-Clerk's judgment entirely covers the ground. "If the appellant can without breach of the criminal law extract teeth and put in false teeth, or the like, I can see nothing in the statute forbidding him from announcing that he does so, which is just announcing that he practises dentistry." I think that under this Act of Parliament any man may say that he does dental acts, but he must not, unless he is a qualified person, say that he does them as a dentist. He must not describe himself as being a person of a particular kind, but he is entitled to say that he is there to do a particular class of acts. For these reasons I think that this appeal succeeds.

KENNEDY L.J. I am of the same opinion. I refrain from saying whether I should assent to what I may call the highest view taken by the learned counsel for the appellants of the meaning of the Act of Parliament in their favour. That meaning is stated by the learned counsel in the argument in *Barnes* v. *Brown* (1) in the sentence "Those words may well mean that the person must hold one of the qualifications specified in the Act so as to entitle him to be registered." Whether the words in s. 3, "specially qualified," are to be confined in that way to the special qualifications which are named in the Act as entitling the person to be registered I will not express an opinion. I cannot say that I am so unfavourably impressed at present by that suggestion as Buckley L.J. has stated that he is; but it is unnecessary to decide that question here, because what does seem to be perfectly clear is that in order to bring s. 3 into effect as against the practitioner in these cases you must find that he has used a description implying that he is a person specially qualified to practise dentistry. The mere statement that he

(1) [1909] 1 K. B. 38.

C. A. 1909 BELLERBY v. HEYWORTH. Kennedy L.J.

practises dentistry certainly does not carry to my mind, and I do not think it would carry to any reasonable mind, that he was asserting that he was a person who was specially qualified. In a clause of this kind one must give, if one can, a meaning to all the words used, and it does not purport to deal with a person who describes himself as qualified to practise dentistry, but with a person who describes himself as specially qualified. It may be, if a person says "I extract teeth," he does assert that he is a person who has the capacity or quality, if you please, of a person who can extract teeth, but he certainly does not assert that he has any special qualification for that purpose. It may be that in the words "specially qualified to practise" the Legislature does not mean to confine the prohibition to a person who uses that which is a definite and recognized personal attribute. In the case which has been referred to where "veterinary" was used as an adjective, not describing the man, but describing his place of business, it may be that the Court was justified in saying "You are really suggesting to the public that you are a veterinary surgeon in the sense of possessing a special and recognized qualification as such." But you must find something of that kind where no attribute is used. In this case, as in *Barnes* v. *Brown* (1), which it is agreed does not differ in its effect in any material particular, there is no attribute of any kind of the man himself; but it is said you may from the words "painless extractions" justly deduce an assertion of the possession by the man of a special qualification. It seems to me that, upon the fair reading of the whole of this advertisement, that is not a just or proper inference. He says "There are in fact done here by me extractions which are painless." As it seems to me, that according to its fair and natural meaning is simply a reference to a certain class of extractions—extractions under some anæsthetic process or with the application of drugs which dull the pain and produce total or comparative painlessness. I decline to draw from that the statement "I am specially qualified to practise dentistry."

As regards the cases which have been cited, other, of course, than *Barnes* v. *Brown* (1), I think one must deal with them as

(1) [1909] 1 K. B. 38.

decisions upon the particular circumstances before the Court in each case. It is unnecessary to say whether one would have agreed or not with a past decision unless agreement or disagreement leads by a proper inference to what the decision should be in the case before one. It seems to me that all those cases may stand consistently with the decision to which we have come in the present case. I will only say with regard to one of them, *Panhaus* v. *Brown* (1), to which I was a party, that, without pretending to remember more than the facts which are recalled by perusing the judgment as reported in the *Justice of the Peace*, it seems to me, as has already been said by Buckley L.J., that that case in no way affects the present, and that the man there was saying "I am a specially qualified dentist," although he was saying so in a roundabout way. The words "German Dental Institute" constituted, as is, in effect, said in the judgment of the Lord Chief Justice, a mere alias. I agree that this appeal should be allowed.

Solicitors: *Percy J. H. Robinson; Dixon & Hunt, for E. T. Spencer, Manchester.*

(1) 68 J. P. 435.

H. B. H.

JOYCE J.
1908
June 18, 19; *July* 1.

In re RAWLINSON.
HILL *v.* WITHALL.

[1877 R. 13.]

Will—Construction—Gift to Issue "according to the parent stock"—Per stirpes—Children not taking concurrently with their Parents.

The testator gave his residuary estate to trustees upon trust on the death of the survivor of his wife and four daughters to divide the same unto, between, and amongst the issue then living of his said daughters in equal shares according to the parent stock and not the number of the individual objects, to the intent that the issue then living of any one of his said daughters might be entitled to a share equal to that which the issue (if any) of any other of them should be entitled to, and in case there should be issue then living of only one of them his said daughters, then the whole to be paid to or equally divided amongst such issue. At the death of the survivor of the testator's wife and daughters there were living children or issue of all the daughters:—

Held, that according to the plain and unambiguous words of the original gift there was a gift to the issue of the daughters per stirpes and not per capita, children not taking concurrently with their parents, and that the ambiguous words of the gift over in the particular event of there being issue living of only one of the daughters ought not to be allowed to affect the construction of the clear original gift.

ADJOURNED SUMMONS.

F. C. Rawlinson by his will dated September 30, 1844, gave his residuary estate to trustees upon certain trusts for the benefit of his widow and four daughters, and on the decease of the survivor of his said widow and daughters he directed his trustees to divide his said residuary estate "unto between and amongst the issue then living of my said four daughters in equal shares according to the parent stock and not to the number of individual objects to the intent that the issue then living of any one of my said daughters may be entitled to a share equal to that which the issue (if any) of any other of them shall be entitled to and in case there shall be issue then living of only one of them my said daughters then the whole to be paid to or equally divided amongst such issue."

The testator died on November 18, 1844, leaving his widow and four daughters surviving. The widow died in 1869,

and the last surviving daughter in 1907. At that date there were living children of three of the daughters, and both children and grandchildren of the other daughter. This was a summons taken out to determine whether on the construction of the testator's will the residuary estate was to be divided amongst all the surviving issue of the testator's four daughters per capita, or whether the division ought to be stirpital throughout, so that no child would take in competition with his or her parent, that was to say, it being admitted that the estate must be divided in the first place into four equal shares, whether the subdivision of each share was to be per stirpes or per capita.

Hughes, *K.C.*, and *A. Brown*, for children of the testator's daughters. When a gift starts with a stirpital division of this sort it must be continued throughout, so that no children or issue take in competition with their parents: *Robinson* v. *Shepherd* (1); *In re Orton's Trust* (2); *Dick* v. *Lacy* (3); *Gibson* v. *Fisher* (4); *In re Wilson* (5); *In re Coulden.* (6)

E. Beaumont and *Sargant*, for parties in the same interest.

Younger, *K.C.*, and *Luxmoore*, for the grandchildren of one of the testator's daughters. The stirpital division comes to an end after the first division. The testator's intention was to divide the estate into four shares, and then that the issue of any one of the daughters should equally participate in her fourth share.

In *Gibson* v. *Fisher* (7) Lord Romilly M.R. said that per stirpes was an expression which meant that all the persons who were to take were to take per stirpes, and that that must run through the whole range of the descents. It is not possible upon this will to say that that is what is meant here.

Hughes, *K.C.*, in reply. "According to the parent stock" is equivalent to "per stirpes and not per capita": Powell on Devises, 3rd ed. vol. i. p. 673.

1908. July 1. JOYCE J. In this case the question to be determined is whether, according to the true construction of the

(1) (1863) 4 D. J. & S. 129.
(2) (1866) L. R. 3 Eq. 375.
(3) (1845) 8 Beav. 214.
(4) (1867) L. R. 5 Eq. 51.
(5) (1883) 24 Ch. D. 664.
(6) [1908] 1 Ch. 320.
(7) L. R. 5 Eq. 58.

JOYCE J. 1908 RAWLINSON, *In re.* HILL *v.* WITHALL.

testator's will, the gift of his residuary estate, on the death of the survivor of his wife and daughters, to the issue then living of his four daughters in equal shares according to the parent stock and not the number of individual objects includes all such issue then living, whether their parents were then living or not, or whether the gift was per stirpes, so that no children or remoter issue could take in competition with their parents. Where property is bequeathed simply to the issue or to the descendants in equal shares per stirpes it is quite settled, as is mentioned by James L.J. in *Ralph* v. *Carrick* (1), where, it being held that the effect of the will was to give the residue to descendants per stirpes and not per capita, his Lordship adds, "so that children do not take concurrently with their parents." Now here the testator directed that from and after the decease of the survivor of his wife and daughters the trustees were to divide his residuary estate amongst the issue then living of his said four daughters in equal shares according to the parent stock and not to the number of individual objects, to the intent that the issue then living of any one of his said daughters might be entitled to a share equal to that which the issue (if any) of any other of them should be entitled to, and in case there should be issue then living of only one of his said daughters, then the whole to be paid to or equally divided amongst such issue. There is nothing whatever here to restrict issue to children, but a gift to "the issue then living of my said daughters in equal shares according to the parent stock and not to the number of individual objects" amounts, in my opinion, simply to a gift to issue then living, such issue taking per stirpes and not per capita, and any question there might otherwise have been as to who were to be taken as the original stocks is precluded by the words that follow, namely, "to the intent that the issue then living of any one of my said daughters may be entitled to a share equal to that which the issue of any other of them shall be entitled to." Now, if the testator had stopped before the words "and in case there should be issue then living of only one of my said daughters then the whole to be paid to or equally divided amongst such issue," the true construction of the gift would be, as I think it is, quite

(1) (1879) 11 Ch. D. 873, 884.

plain and unambiguous, namely, to the issue per stirpes and not per capita, children not taking concurrently with their parents; but there follow the words "and in case there shall be issue then living of only one of my said daughters then the whole to be paid to or equally divided amongst such issue," apparently the issue of that daughter per capita, and all taking concurrently. But this event has not happened, and to my mind these subsequent words do not really create any difficulty. If the event had happened, I think there would have been a question as to the meaning of the clause, and it would have been arguable that, by construction, the further words per stirpes, or according to the stock, would have to be supplied. It is quite true, as stated by Cotton L.J. in *Ralph* v. *Carrick* (1), and no doubt it is a sound principle, that where there are ambiguous words in the original gift you should not construe the gift over in a restrictive sense, which it does not otherwise bear, but should construe the ambiguous words contained in the previous gift so as to agree with the unambiguous words contained in the gift over. But here I consider the words in the original gift to be plain and unambiguous taken by themselves, and that it would not be right to allow the construction of the gift over in one particular event mentioned, which event has not happened, to compel the Court to place a forced and improper construction upon the meaning of the original gift when those words are as plain as they are here. Therefore there must be a declaration that, according to the true construction of the will, the gift on the death of the survivor of the wife and daughters to the issue then living of the four daughters in equal shares according to the parent stock and not to the number of the individual objects is a gift to such issue per stirpes throughout, children not taking concurrently with their parents.

Solicitors: *Biggs, Roche & Co.; Hicks, Arnold & Mozley; Travers-Smith, Braithwaite & Co.*

(1) 11 Ch. D. 888.

G. A. S.

SWINFEN EADY J.

1909

March 16, 23.

In re ACCRINGTON CORPORATION STEAM TRAMWAYS COMPANY.

[00167 of 1908.]

Company—Winding-up—Parliamentary Company—Distribution of Assets—Preference Shares—Priority—Deficiency of Capital—Undistributed Profits—Undeclared Preferential Dividends—Companies Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 16), *s.* 120.

Apart from some special provision in that behalf, preference shares in a parliamentary company incorporated by a special Act that incorporates the Companies Clauses Acts have no priority as to capital.

Preference shareholders in such a parliamentary company have no right or claim to their fixed preferential dividends, cumulative or non-cumulative, unless and until declared under s. 120 of the Companies Clauses Consolidation Act, 1845.

Bond v. *Barrow Hæmatite Steel Co.*, [1902] 1 Ch. 353, 362, applied.

If the assets realized in a winding-up are insufficient to return the preference and ordinary capital in full, the preference shareholders cannot claim any arrears of undeclared preferential dividends out of undistributed profits, but the whole assets must be distributed rateably among all the shareholders in proportion to their capital.

In re Crichton's Oil Co., [1902] 2 Ch. 86, 95, applied.

SUMMONS.

The above company was registered under the Companies Acts on December 12, 1885, under the name of "The Accrington Corporation Steam Tramways, Limited."

The capital was 25,000*l.* divided into 1500 preference and 1000 ordinary shares of 10*l.* each.

The memorandum and articles did not define the preferential rights, but provided that the directors might issue the shares "with such preferential right to dividend and such priority in the distribution of assets" as they might think proper.

By December 31, 1886, the directors had issued 1385 shares, made up of 733 preference shares, with a cumulative preferential dividend of 6 per cent., and 652 ordinary shares, all fully paid. The preference shares were not given priority as to capital.

On July 5, 1887, the company was dissolved and reincorporated as a parliamentary company by the Accrington Corporation

Steam Tramways (Haslingden and Rawtenstall Extension) Act, 1887 (50 & 51 Vict. c. lvi.).

Sect. 2 incorporated the Companies Clauses Consolidation Act, 1845, and Part I. (relating to cancellation and surrender of shares) of the Companies Clauses Act, 1863 (26 & 27 Vict. c. 118), but it did not incorporate Part II. of that Act, making dividends non-cumulative.

Sect. 4 provided that the limited company should be dissolved and the persons who were members of that company and all other persons who should thereafter subscribe to or become proprietors in the undertaking should be united into a company for the purposes of the Act and incorporated by the name of "The Accrington Corporation Steam Tramways Company."

Sect. 6 provided that the memorandum and articles of the limited company should as to any prospective operation thereof be wholly void.

Sect. 7 preserved existing rights and liabilities.

Sect. 19. "The capital of the company shall be 60,000*l.* divided into 6000 shares of 10*l.* each of which 3000 shares shall be preference shares (including the preference shares already issued by the limited company) bearing interest at a rate not exceeding 6*l.* per centum per annum and 3000 shall be ordinary shares (including the ordinary shares already issued by the limited company)."

Sect. 20 provided that 1385 fully-paid shares should be vested in the existing members of the limited company in substitution for their existing shares in the proportion of one ordinary or preference share, as the case might be, for each ordinary or preference share in the limited company, and the shares so vested should be subject to the same provisions as immediately before the Act affected the shares for which they were substituted.

Sect. 21 provided for the calling in of the old and issue of new certificates.

Sect. 22. "The company may from time to time subject to the provisions of Part II. (relating to additional capital) of the Companies Clauses Act, 1863, issue the remaining 4615 shares in the capital of the company and 2267 but not more of such shares shall be issued as preference shares."

SWINFEN EADY J.

1909

ACCRINGTON CORPORATION STEAM TRAMWAYS COMPANY, *In re.*

It will be observed that the 2267 new preference shares plus the 733 old preference shares would make up the 3000 preference shares authorized, and that the 4615 new shares plus the 1385 old shares would make up the total 6000 shares authorized.

In 1887 and 1888 the 2267 new preference shares "bearing interest at 6 per cent. per annum" were issued. Ordinary shares were also issued, and the total capital in fact issued was 52,680*l.*, consisting of 3000 preference and 2268 ordinary shares, all fully paid.

The full preferential dividend was paid up to December 31, 1907, except that in 1890 and 1894 no dividend was paid, and in 1891 only 5 per cent. was paid. From 1895 dividends ranging from 4½ to 6 per cent. were paid on the ordinary shares notwithstanding the 13 per cent. arrears of the preferential dividends on the old preference shares.

In 1907 the company's tramways were taken over by the public authorities and the assets realized. On December 31, 1907, the balance sheet shewed a deficiency of capital to the extent of 11,849*l.* This was subsequently reduced to 11,249*l.* by the sale of the one asset that remained unrealized. The profit and loss account for 1907, less a full 6 per cent. interim dividend to preference and ordinary shareholders, shewed a balance of 268*7l.*

At the annual meeting on February 26, 1908, a 6 per cent. dividend for the last half of 1907 was declared on all the shares. This absorbed 150*1l.*, and 118*6l.* was carried forward.

On June 30, 1908, the company was wound up under s. 199 of the Companies Act, 1862 (25 & 26 Vict. c. 89). By that date there was a further net profit of 408*l.* arising from interest on investments and money on deposit.

The liquidator issued this summons to determine whether in the distribution of the assets either the old or the new preference shareholders had any priority as to capital or income.

Jolly, for the liquidator.

Wright Taylor, for the old preference shareholders. Part II. of the Companies Clauses Act, 1863, not being incorporated

as to our shares, the preferential interest was cumulative under the previous law: *Henry* v. *Great Northern Ry. Co.* (1); and whether it was strictly interest or only dividend, we are entitled to the 1186*l.* undistributed profits in respect of our 13 per cent. arrears, amounting to 5717*l.*, although no dividend was or can now be declared out of those profits: *In re Bridgewater Navigation Co.* (2); *Bishop* v. *Smyrna and Cassaba Ry. Co.* (3) We are also entitled jointly with the new preference shareholders to the current profit of 408*l.* in respect of the current half-year's interest. We also claim to be repaid our capital in priority to the ordinary shareholders.

[SWINFEN EADY J. Is there any case in which preference shares in a parliamentary company have been given priority as to capital?]

There is no authority to the contrary.

[SWINFEN EADY J. There is nothing in the special Act or the Companies Clauses Acts to give any such priority.]

The special Act creates "preference shares" and gives them "interest." It does not use the word "dividend" at all. Does not this imply a priority as to both capital and interest?: *In re Bangor and Portmadoc Slate and Slab Co.* (4); *Somes* v. *Currie* (5); *In re Scinde, Punjaub, and Delhi Corporation* (6); *Sheppard* v. *Scinde, Punjaub, and Delhi Ry. Co.* (7); *Birch* v. *Cropper.* (8)

Rostron, for the new preference shareholders. Our interest or dividend comes under Part II. of the Companies Clauses Act, 1863, and is non-cumulative, so that our only claim for interest is against the 408*l.* current profit. Otherwise we are in the same position as the old preference shareholders.

Bischoff, for the ordinary shareholders. There is no distinction between the words "dividend" and "interest" as used in the Companies Clauses Acts. Sects. 14 and 15 of the Act of 1863 use the expression "dividend or interest" throughout, and

(1) (1857) 1 De G. & J. 606.
(2) [1891] 1 Ch. 155, 167.
(3) [1895] 2 Ch. 265.
(4) (1875) L. R. 20 Eq. 59.
(5) (1855) 1 K. & J. 605.
(6) (1867) L. R. 6 Ch. 53, n.
(7) [1887] W. N. 47, 132; 35 W. R. 516; 36 W. R. 1; affirmed by House of Lords, (1889) 60 L. T. 641.
(8) (1889) 14 App. Cas. 525.

SWINFEN EADY J.

1909

ACCRINGTON CORPORATION STEAM TRAMWAYS COMPANY, *In re.*

408*l.* as a dividend for 1908. Now I must bear in mind that I am dealing with a company whose assets are insufficient to return the shareholders their capital, and the question is whether either class of preference shareholders is entitled to dividends out of these sums, or whether they ought not to be distributed rateably between the shareholders as capital.

The company being a parliamentary company is governed by the Companies Clauses Consolidation Act, 1845, which is incorporated by the special Act. Under the heading "And with respect to the powers of the directors, and the powers of the company to be exercised only in general meeting," s. 90 declares what powers are to be exercised by the directors, and s. 91 provides that "the following powers of the company, (that is to say,) . . . . the declaration of dividends, shall be exercised only at a general meeting of the company."

Under the heading "And with respect to the making of dividends," s. 120 provides that "Previously to every ordinary meeting at which a dividend is intended to be declared the directors shall cause a scheme to be prepared, showing the profits, if any, of the company for the period current since the preceding ordinary meeting at which a dividend was declared, and apportioning the same, or so much thereof as they may consider applicable to the purposes of dividend, among the shareholders, according to the shares held by them respectively, the amount paid thereon, and the periods during which the same may have been paid, and shall exhibit such scheme at such ordinary meeting, and at such meeting a dividend may be declared according to such scheme."

Sect. 122. "Before apportioning the profits to be divided among the shareholders the directors may, if they think fit, set aside thereout such sum as they may think proper to meet contingencies . . . . and may divide the balance only among the shareholders."

Now in *In re Crichton's Oil Co.* (1) Stirling L.J. says: "A dividend means prima facie a payment made to the shareholders while the company is a going concern; after the commencement of a winding-up dividend is no longer payable. Prima facie,

(1) [1902] 2 Ch. 86, 95.

statutory provision as to the distribution of assets on the winding-up of a parliamentary company.

SWINFEN EADY J. (after stating the preliminary facts and referring to the special Act). The result is that 1385 shares were to be issued in respect of the old capital, of which 733 were to be preference shares, and as to those Part II. of the Companies Clauses Act, 1863, was not incorporated. As to the 2267 new preference shares it was incorporated. The effect of this was to place the old and new preference shares on a different footing. They both became preference shares in the parliamentary company, and not in the limited company, but the old preference shares had a 6 per cent. cumulative preferential dividend, whereas the 2267 new shares, being governed by Part II. of the Companies Clauses Act, 1863, were non-cumulative.

The preferential rights of the old preference shares are established by *Henry* v. *Great Northern Ry. Co.* (1) and are cumulative. The Companies Clauses Act, 1863, which was passed subsequently to that decision, and of which Part II. is only incorporated with reference to the new shares, provides (s. 13) regulations for the issue of new preference shares where authorized by the special Act, and provides (s. 14) that "the preference shares . . . . so issued shall be entitled to the preferential dividend or interest assigned thereto, out of the profits of each year, in priority to the ordinary shares . . . . but if in any year . . . . there are not profits available for the payment of the full amount of preferential dividend or interest for that year, no part of the deficiency shall be made good out of the profits of any subsequent year, or out of any other funds of the company." The new preference shares are therefore non-cumulative. [His Lordship then stated the remaining facts, including the carrying forward of the 1186*l.* undistributed profit of 1907 and as to the additional 408*l.* profit accrued in 1908, and continued:—]

The old preference shareholders claim the 1186*l.* in respect of the 13 per cent. arrears of their cumulative preferential dividend, and both the old and new preference shareholders claim the

(1) 1 De G. & J. 606.

SWINFEN EADY J.

1909

ACCRINGTON CORPORATION STEAM TRAMWAYS COMPANY, *In re.*

408*l.* as a dividend for 1908. Now I must bear in mind that I am dealing with a company whose assets are insufficient to return the shareholders their capital, and the question is whether either class of preference shareholders is entitled to dividends out of these sums, or whether they ought not to be distributed rateably between the shareholders as capital.

The company being a parliamentary company is governed by the Companies Clauses Consolidation Act, 1845, which is incorporated by the special Act. Under the heading "And with respect to the powers of the directors, and the powers of the company to be exercised only in general meeting," s. 90 declares what powers are to be exercised by the directors, and s. 91 provides that "the following powers of the company, (that is to say,) . . . . the declaration of dividends, shall be exercised only at a general meeting of the company."

Under the heading "And with respect to the making of dividends," s. 120 provides that "Previously to every ordinary meeting at which a dividend is intended to be declared the directors shall cause a scheme to be prepared, showing the profits, if any, of the company for the period current since the preceding ordinary meeting at which a dividend was declared, and apportioning the same, or so much thereof as they may consider applicable to the purposes of dividend, among the shareholders, according to the shares held by them respectively, the amount paid thereon, and the periods during which the same may have been paid, and shall exhibit such scheme at such ordinary meeting, and at such meeting a dividend may be declared according to such scheme."

Sect. 122. "Before apportioning the profits to be divided among the shareholders the directors may, if they think fit, set aside thereout such sum as they may think proper to meet contingencies . . . . and may divide the balance only among the shareholders."

Now in *In re Crichton's Oil Co.* (1) Stirling L.J. says: "A dividend means prima facie a payment made to the shareholders while the company is a going concern; after the commencement of a winding-up dividend is no longer payable. Prima facie,

(1) [1902] 2 Ch. 86, 95.

therefore, the right of the preference shareholders was limited to the payment of a preferential dividend while the company was a going concern."

In the present case the only power to declare a dividend was at a general meeting, the necessary scheme having been previously prepared by the directors. The last general meeting was on February 26, 1908, when a dividend was declared out of the 2687*l.*, and 1186*l.* was carried forward. The statutory provisions for the declaration of a dividend are no longer applicable since the winding-up.

It was suggested that the 1186*l.* undistributed profit really belonged to the old preference shareholders. That is erroneous. They were only entitled to a dividend if declared under s. 120, and the directors had full power to carry forward the 1186*l.* for contingencies under s. 122. The remarks of Farwell J. in *Bond* v. *Barrow Hæmatite Steel Co.* (1), though addressed to the case of a limited company, are in this connection applicable to a parliamentary company. He says: "It is argued that the provisions as to the declaration of a dividend do not apply to shares on which a fixed preferential dividend is payable. In my opinion this is not so. The necessity for the declaration of a dividend as a condition precedent to an action to recover is stated in general terms in Lindley on Companies, 5th ed. p. 437, and, where the reserve fund article applies, it is obvious that such a declaration is essential, for the shareholder has no right to any payment until the corporate body has determined that the money can properly be paid away. It is urged that this puts the preference shareholders at the mercy of the company, but the preference shareholders came in on these terms, and this argument does not carry much weight in an action such as this, where bona fides is conceded. The opposite conclusion might enable the preference shareholders to ruin the company, and would certainly lead to great inconvenience in enabling them to compel the payment out of the last penny without carrying forward any balance. Granted that it is a hardship to go without dividends for a time, this hardship presses more heavily on the ordinary shareholders who have to wait until the preference

(1) [1902] 1 Ch. 353, 362.

SWINFEN EADY J.
1909
TAFF VALE RAILWAY v. GORDON CANNING.

the Railways Clauses Consolidation Act, 1845 (set out at the beginning of the judgment). The gates were kept locked, the key being kept at a neighbouring signal-box.

When the farmer wished to move sheep, cattle or farm carts over the line he borrowed the key from the signalman and returned it as soon as the operation was over, the signalman in the meantime carefully watching the line and keeping the signals at danger.

This only happened once or twice a week, and sometimes only once a month, and as a rule there would be only one crossing and recrossing on any one day.

There was no stile or other provision for foot passengers, and the only other access to plot A was by stepping-stones over the Rhondda when the river was low.

In 1891 plot A was surrendered to the estate by the farmer, but it continued to be used as before for agricultural purposes until 1904.

In the meantime the farm field and other lands on the south-west of the line, which had been purely agricultural, were largely built over, and formed the village of Ton. The Ton end of the level crossing now opened on a public road.

In 1904 the defendants let plot A to a tennis club. There were originally about one hundred members, but their number was increasing. Many of the members and their friends habitually used the level crossing, though some used the stepping-stones when the river was low.

There were twenty or thirty players on ordinary days and forty or fifty on the Thursday and Saturday half-holidays. For this season matches with other clubs had been arranged, so that the attendance would be much increased.

The usual hours of play were from about 2 P.M. to dusk. The players ordinarily came to the ground two or three at a time, but left in large batches at dusk. As a rule they climbed the gates, but sometimes lifted them off their hinges for the convenience of the older members.

The evidence shewed that owing to the large main line traffic, namely, eighty to eighty-five trains a day, mostly mineral trains, and the large amount of shunting necessitated by an adjoining

colliery siding, this constant and promiscuous user of the level crossing by the club was exceedingly dangerous and would probably lead to a very serious accident.

The plaintiffs contended that the level crossing ought only to be used for agricultural purposes, and in any case it ought not to be used so as to substantially increase the burden of the easement.

Upjohn, K.C., and *J. G. Wood*, for the plaintiffs. A railway company has no general power of granting easements: *Mulliner* v. *Midland Ry. Co.* (1) It is necessary to find some statutory power. This level crossing was made as an accommodation work under s. 68 of the Railways Clauses Consolidation Act, 1845. These accommodation works can only be required to be made for the land in its condition at the time of severance, and the user is limited accordingly: *Reg.* v. *Fisher* (2); *Reg.* v. *Brown* (3), approved in *Rhondda and Swansea Ry. Co.* v. *Talbot.* (4)

[SWINFEN EADY J. Those cases only deal with the question of what works the company can be required to construct, and what additional works the owner may construct. They do not touch the question of the user of the works when constructed.]

This user could not have reasonably been contemplated when the works were made. The defendants are not entitled to use the level crossing "so as substantially to increase the burden of the easement by altering or enlarging its character, nature, or extent" as enjoyed at the date of the taking of the land or the construction of the line: *Great Western Ry. Co.* v. *Talbot* (5), following *Great Northern Ry. Co.* v. *M'Alister.* (6)

Levett, K.C., and *Percy Wheeler*, for the defendants. The plaintiffs were only bound to make accommodation works suitable to the existing state of the land: Railways Clauses Consolidation Act, 1845, s. 68; *Reg.* v. *Brown.* (3) But there is nothing in the statute or the decisions to shew that the user can never be changed. The accommodation works can be used for any purpose to which the land may be appropriated: *United Land Co.*

(1) (1879) 11 Ch. D. 611.
(2) (1862) 3 B. & S. 191, 199.
(3) L. R. 2 Q. B. 630.
(4) [1897] 2 Ch. 131, 137.
(5) [1902] 2 Ch. 759, 767.
(6) [1897] 1 I. R. 587.

SWINFEN EADY J.
1909
TAFF VALE RAILWAY v. GORDON CANNING.

v. *Great Eastern Ry. Co.* (1); *Finch* v. *Great Western Ry. Co.* (2) Of course the burden of the easement must not be increased, but otherwise any reasonable user is allowed. It is not confined to agricultural purposes.

In *Great Northern Ry. Co.* v. *M'Alister* (3) the use of the traction engine created a great danger to the railway and greatly increased the burden of the easement; and in *Great Western Ry. Co.* v. *Talbot* (4) the landowner used the crossing for goods brought on her land from other places, thereby increasing the burden.

In the present case the members of the club cross at their own risk, and there is no danger to the railway. There is no interruption to the traffic as in the case of sheep or cattle crossing, and the burden of the easement is really diminished.

J. G. Wood, in reply. The burden of the easement has been substantially increased by altering the character, nature and extent as forbidden by *Great Western Ry. Co.* v. *Talbot.* (4) It was formerly purely agricultural. Sheep and cattle crossed occasionally under very careful supervision. Now the club members cross daily at all times of the afternoon irrespective of the traffic. If this is allowed the line will have to be watched continuously, as although there may be no physical danger to the railway, the plaintiffs would run the risk of an action for negligence if any one were injured.

United Land Co. v. *Great Eastern Ry. Co.* (1) turned on the provisions of a very special enactment, and is distinguished in *Great Western Ry. Co.* v. *Talbot.* (4) The plaintiffs only ask for a declaration with liberty to apply for an injunction.

SWINFEN EADY J., after stating the nature of the action and the circumstances under which the strip was acquired, continued:—The level crossing in question was made to connect plot A with the larger portion of the field from which it was severed. The works were constructed under s. 68 of the Railways Clauses Consolidation Act, 1845, which provides that "The company shall make and at all times thereafter maintain the

(1) L. R. 10 Ch. 586, 589, 591.
(2) 5 Ex. D. 254.
(3) [1897] 1 I. R. 587.
(4) [1902] 2 Ch. 759, 767.

following works for the accommodation of the owners and occupiers of lands adjoining the railway; (that is to say) Such and so many convenient gates, bridges, arches, culverts, and passages over, under, or by the sides of or leading to or from the railway as shall be necessary for the purpose of making good any interruptions caused by the railway to the use of the lands through which the railway shall be made; and such works shall be made forthwith after the part of the railway passing over such lands shall have been laid out or formed, or during the formation thereof: "

No trace can now be found of any arrangement or agreement between the plaintiffs and the defendants' predecessor in title. That is conceded by both sides, so that the point simply depends upon the statutory rights, powers, and obligations. In other words, I am simply dealing with a case governed by s. 68, pursuant to which the level crossing was erected as part of the accommodation works. The plaintiffs contend that the defendants are not entitled to use the level crossing for any purpose other than agricultural purposes in connection with their lands on either side of the railway, as the same lands were used and enjoyed at the time of the construction and completion of the railway. That is the claim put forward in the statement of claim.

By their defence the defendants set up a higher right and say "the level-crossing was made by the plaintiff company for the purpose of providing a means of access to the said land for all persons who might be desirous of going to or from the said land for any purpose whatsoever and the said level crossing has been so used ever since it was first made."

Now it was decided, many years ago, that the obligation of a railway company with regard to the construction of accommodation works has reference to, and is limited by, the user of the land at the time that the railway is constructed and the land is taken. In one of the cases referred to, *Reg.* v. *Brown* (1), where damages for severance were given in consequence of the severed land having been deprived of access, it was held "that the compensation jury, valuing it as building land, might estimate the damage by severance as if all

(1) L. R. 2 Q. B. 630.

SWINFEN EADY J.
1909
TAFF VALE RAILWAY v. GORDON CANNING.

access were cut off, without any regard to the power of justices to order accommodation works under ss. 68 and 69 of the Railways Clauses Consolidation Act; as those works could only be ordered with reference to the land as then used for agricultural purposes, and would have been useless as an access to building land"; so that compensation for severance was allowed upon the footing that it was building land, but without any statutory right in the owner to require the provision of a means of access suitable to the land as a building estate.

The principle of those cases has been followed and extended, and I think the law must now be treated as settled by *Great Northern Ry. Co.* v. *M'Alister* (1), adopted and approved by the English Court of Appeal in *Great Western Ry. Co.* v. *Talbot* (2), namely, that a landowner is not entitled to use the level crossing or other the accommodation works provided "so as substantially to increase the burden of the easement by altering or enlarging its character, nature, or extent" as enjoyed at the date of the taking of the land or the construction of the line.

The defendants referred to two cases in support of their contention that the landowner was entitled to use the crossings or works made by the company as a means of communication for every purpose to which at the time of the land being taken or at any future time the owner should think fit to appropriate his land, and insisted that the present case was governed by the principles laid down in *United Land Co.* v. *Great Eastern Ry. Co.* (3) In my opinion there is no foundation whatever for that contention. In that case the lands in question had been taken by the Crown under an Act of 1709 enabling the Crown to buy lands for the purpose of fortifications.

By a special Act of 1847 the railway company were empowered to take part of the lands so acquired by the Crown. This Act contained a provision that the company should at their own cost and charges make and construct such convenient communications across, over, or under the railway as the Commissioners of Woods and Forests should deem necessary for the convenient enjoyment and occupation of the lands. Now it must be

(1) [1897] 1 I. R. 587. (2) [1902] 2 Ch. 759, 767.
(3) L. R. 10 Ch. 586, 589, 591.

remembered that the lands were taken by the Crown for the purposes of fortifications. James L.J. pointed out that "the railway company were to make such communications for the convenient enjoyment of the lands as the Commissioners of Woods and Forests should in their judgment think necessary"; and that it was impossible to say that that clause involved a restriction that the communication was to be only such as they should think necessary for the convenient enjoyment and occupation of the lands exactly in their present state and for no other purposes. That would wholly defeat the object for which the lands were being taken. James L.J. says: "It seems to me unreasonable to assume that the commissioners could require communications for the convenient enjoyment and occupation of the lands only as they were at the time." On the construction of the statute it was held that the commissioners were entitled to require the communication to be made for all purposes and for the future use of the lands in any condition in which they might thereafter be. Mellish L.J. says: "Suppose the communication had been made over the railway by a bridge, or under the railway by a tunnel, and that the Crown had required a bridge to be made of a certain size, capable of carrying a certain weight, or a tunnel to be made of a certain description, it would be very absurd to suppose that the Crown could not use that bridge or that tunnel for any purposes which the Crown might think fit." In other words, the railway company were bound to make the accommodation works not merely for the purposes of the lands as they existed at the date of the taking, as is the case under s. 68, but under the special terms of their special Act they were bound to construct whatever accommodation works the Commissioners of Woods and Forests might require for the use of the lands and for all purposes. That case has no bearing whatever upon the present case, and the same remark applies to *Finch* v. *Great Western Ry. Co.* (1)

The question, therefore, which arises is a question of fact, namely, whether what the defendants are claiming the right to do is such as substantially to increase the burden of the easement in the manner I have pointed out. Now at the time at

(1) 5 Ex. D. 254.

SWINFEN EADY J.

1909

TAFF VALE RAILWAY v. GORDON CANNING.

which the land in question was taken, not only was it agricultural land, but the surrounding district seems to have been an entirely agricultural district. That is nearly sixty years ago, but since that time the character of much of the neighbourhood has entirely changed, pits have been opened, mines developed, and the village of Ton, which now appears upon the Ordnance map before me, seems to have wholly grown up within that period. [His Lordship then stated the facts as to the large amount of traffic and shunting, shewing that the level crossing was in a peculiarly dangerous position, and that there was great risk of accident to people using it. Down to 1904 the user was small and occasional, and for agricultural purposes only, and the sheep and cattle were only taken across after obtaining the keys from the signalman, who kept the signals at danger till they had crossed. The user by the tennis club was of an entirely different character. The number of members was originally one hundred, but it was constantly increasing, and the members and their friends used the crossing. There would be twenty to thirty players on ordinary week days, and forty to fifty on the Thursday and Saturday half-holidays, and in the coming season there would be extra attendance owing to the matches with other clubs, so that a large and increasing number of people would be brought on the grounds from 2 P.M. until dusk, most of whom would go and return by the level crossing. There was, therefore, a very much larger number of persons than was contemplated at the time the land was taken habitually crossing the railway as a means of access to and from the tennis ground. Some persons climbed the gates, but sometimes they were lifted off the hinges for the convenience of the older members. The Ton gate opened directly on to a public road. His Lordship continued :—]

This kind of user tends to increase and would, in my opinion, enormously increase the risk of accident at this very dangerous spot. People leave the club in the dusk of the evening, no doubt engaged in conversation, talking and laughing, with trucks being shunted up and down this very dangerous spot. This user is calculated to lead to a very serious accident. It is the sort of user that Lord Ashbourne C. referred to in

Great Northern Ry. Co. v. *M'Alister* (1), saying: "The Vice-Chancellor, after hearing the case, arrived at the conclusion that the company had made out their case, and that the use sought to be applied by the owner of the farm was one not at all in keeping with the object for which the level crossing was made, and that the proposed user would cause danger to the company in the lawful use of their property and business. . . . . They were bound by the Act of Parliament to provide the accommodation works; they were bound to erect them in a manner sufficient for any fair use to which they could be put at the time the accommodation works were erected. On that case this traction engine is a perfectly new departure. It is a novel and serious element of danger introduced into their traffic which they were bound at once to look to. It would involve new burdens on the railway company. It must prove an element of peril or danger in the management of their traffic and in the working of their line. It was pointed out by Holmes, L.J., at an early stage of the argument that this cannot be treated as an isolated case, but that if it is found that such a level crossing could be turned into a roadway for minerals and other matters, it would be a far-reaching matter, which might involve a vast amount of peril to the public; it might involve a considerable amount of additional expense to the railway company, and it might necessitate the employment by the company of additional servants as signalmen." One can quite understand the great additional burden that would be thrown upon the plaintiffs of watching this crossing during the part of the day when shunting was going on in order to protect people from being injured by the trucks being sent backwards and forwards. It is a growing user. If the defendants can use the crossing for a tennis club, they can use it for a football match. They might claim the right when tennis is over and football is being played of inviting those large crowds of people who nowadays always seem to attend a football match. User of this kind is, in my opinion, quite outside the purpose for which the land was used at the date when the plaintiffs acquired it, and does very substantially increase the burden upon the plaintiffs. The user of the land does enlarge

(1) [1897] 1 I. R. 587, 603.

SWINFEN EADY J.

1909

TAFF VALE RAILWAY v. GORDON CANNING.

and alter the nature, character, and extent of the right previously enjoyed, and, in my opinion, it would be a far greater burden upon the servient tenement, and would subject the plaintiffs to much greater strain and burden in the management of their traffic, which is a difficult traffic to manage at this spot. In these circumstances the plaintiffs are entitled to relief, but they are not entitled to the wide declaration they ask, restricting the user of the crossing to agricultural purposes. There will be a declaration that the defendants are not entitled to use the level crossing as a means of access to the ground for the tennis club and its members and friends, or otherwise so as substantially to increase the burden of the easement by altering or enlarging its character, nature, or extent as enjoyed at the time of the construction of the railway: with liberty to apply for an injunction. The costs will follow the event, and there will be general liberty to apply.

Solicitors: *Williamson, Hill & Co., for Ingledew & Sons, Cardiff; Rider, Heaton & Wigram.*

G. R. A.

In re NORTON AND LAS CASAS' CONTRACT.

NEVILLE J.

1909

April 28.

[1909 N. 30.]

Vendor and Purchaser—Title—Sale by Tenant for Life—Incumbrance prior to Settlement—Purchase-money paid to Incumbrancer—Receipt for Purchase-money—Direction of Tenant for Life—Concurrence of Trustees—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-s.* 9; *ss.* 21, 22.

Where property sold by a tenant for life is subject to an incumbrance prior to the settlement, which exceeds the purchase-money in amount, and the whole of the purchase-money is intended to be applied in reduction of the incumbrance, the purchaser is not justified in paying his purchase-money direct to the incumbrancer by the direction of the tenant for life. He cannot get a good discharge for his purchase-money except by paying it to or by the direction of the trustees of the settlement or into Court. The absence of such a discharge will prevent the purchaser making a good title upon a subsequent sale.

On December 30, 1908, George Edward Norton entered into a contract with Dorothy Helen de Las Casas for the sale to her of a piece of land at Clapton in Somerset. In due course an abstract was delivered shewing the following title. By a settlement dated April 25, 1883, made on the marriage of Charles Penruddocke, certain estates, including the land agreed to be sold, were settled to the use of Charles Penruddocke for life with remainder to the use of his wife for life, with remainder to trustees for a term of 600 years upon trust to raise by mortgage or sale in the events which happened 10,000*l.* for portions for younger children.

The said Charles Penruddocke by his will, dated April 21, 1894, devised all his Somerset estate to trustees upon trust as to part thereof, including the land agreed to be sold, to pay the rents thereof to his two daughters Constance and Sybil during their joint lives and to the survivor during her life with remainders over. The trustees were made trustees of the will for the purposes of the Settled Land Acts. Charles Penruddocke died in 1899, and his wife died in 1902. In 1903 the two daughters Constance and Sybil Penruddocke sold part of the estate, including the land in question, to Norton, the present vendor, for 3000*l.* At that time the term for 600 years was still in existence and no part of

NEVILLE J. 1909 NORTON AND LAS CASAS' CONTRACT, *In re.*

the 10,000*l.* had been raised. The conveyance, dated July 27, 1903, was made between Constance and Sybil Penruddocke of the first part, the trustees of the term of the second part, and Norton of the third part. After reciting the agreement for sale and that on the treaty for the said sale it was agreed that the purchase-money of 3000*l.* should be paid to the trustees of the term in part payment of the said sum of 10,000*l.*, it was witnessed that "In pursuance of the said agreement and in consideration of 3000*l.* upon the execution hereof paid by the purchaser by the direction of the said Constance and Sybil Penruddocke" to the trustees of the term (the receipt and payment whereof the said trustees and the said Constance and Sybil Penruddocke thereby respectively acknowledged) the said Constance and Sybil Penruddocke, in exercise of the powers vested in them by the Settled Land Act, as beneficial owners granted and the trustees of the term, to the intent to merge the said term of 600 years as trustees, assigned and surrendered to the said G. E. Norton the lands therein described, to hold the same to the use of the said G. E. Norton, his heirs and assigns, freed and discharged from the said sum of 10,000*l.* and interest.

There were trustees of the will of Charles Penruddocke, for the purposes of the Settled Land Acts, in existence, but they were not made parties to the deed, nor did they give any directions as to payment of the purchase-money.

On delivery of this abstract the purchaser made requisitions, of which No. 4 was "With regard to conveyance of 27 July 1903 the vendors conveyed as tenants for life in exercise of powers of the Settled Land Acts. The whole of purchase-money was received by the trustees of the term of 600 years and the trustees for the purposes of the Settled Land Acts appointed by the will of Charles Penruddocke were not joined. As they were the only competent persons to give receipt for purchase-money of anything the vendors conveyed this should be rectified. The direction of the vendors for payment of purchase-money to trustees of the term was ultra vires."

The vendor answered: "The trustees of the settlement were entitled to receive and did receive the whole of the purchase-money, and they were also entitled to give and did give a discharge for

the purchase-money. The trustees of the will for the purposes of the Settled Land Acts were in existence, but in the circumstances their concurrence in the conveyance was not necessary."

The purchaser insisted on her objection, and the vendor took out this summons for a declaration that the purchaser's objections to the title (and in particular No. 4) had been sufficiently answered by the vendor and a good title shewn.

H. Greenwood, for the vendor. Where there is an incumbrancer whose charge is prior to the settlement and exceeds the purchase-money in amount, so that he can insist on having the whole purchase-money paid to him, there is nothing to be paid to the trustees or which comes under the settlement at all. There is no reason, therefore, for making the trustees of the settlement join in the conveyance. Even if there are no trustees in existence the purchaser gets a good title: *In re Fisher and Grazebrook's Contract* (1); and if there are trustees, he is not concerned with any question as to notice: *Duke of Marlborough* v. *Sartoris*. (2) The question is not one of title at all, but of whether the purchaser gets a good discharge for his purchase-money, and that does not affect a subsequent purchaser. The only possible reason for making the trustees parties to the conveyance would be to get their admission that the incumbrance was existing, and we have ample evidence of that. A mortgage for a term is a proper incumbrance to be paid off out of purchase-money: *In re Frewen*. (3) The tenant for life is himself a trustee for all persons concerned. If the purchaser, the present vendor, was satisfied that the money was paid to the right person—and there was no possible doubt about it—it was a mere technicality to require that it should pass through the hands of the trustees. The purchaser acting in good faith is protected by s. 54 of the Settled Land Act: *Mogridge* v. *Clapp*. (4)

W. H. Bond, for the purchaser, was not called upon.

NEVILLE J. In this case two ladies, who together constituted the tenant for life for the purposes of the Settled Land Acts of

(1) [1898] 2 Ch. 660.
(2) (1886) 32 Ch. D. 616.
(3) (1888) 38 Ch. D. 383.
(4) [1892] 3 Ch. 382.

NEVILLE J. 1909

NORTON AND LAS CASAS' CONTRACT, *In re.*

property settled by a will, contracted to sell part of the settled land. It turned out that the purchase-money was less than the money due upon an incumbrance affecting the whole of the settled land, which was prior to the settlement made by the will. The sale was carried out and the whole of the purchase-money was paid by the direction of the tenant for life to the incumbrancer in reduction of his charge, and so far as appears the trustees of the will were ignored altogether. The question is whether under these circumstances the purchaser got a good discharge for his purchase-money. It is admitted that in ordinary cases of a sale under the Settled Land Acts a tenant for life cannot give a good discharge for the purchase-money. But it is contended that in a case like the present one, where the purchase-money is insufficient to pay off an incumbrance which is prior to the settlement, the whole of the purchase-money goes properly to the incumbrancer, and consequently there is nothing which comes under the settlement at all, and nothing for the trustees to receive, and their concurrence is unnecessary. The real question is to whom did the purchaser pay the purchase-money? In my opinion it is clear that he paid it to the tenant for life. The incumbrancer was not selling. The purchase-money was paid to him on the direction of the tenant for life, and the only discharge the purchaser got was that of the tenant for life. Is that sufficient? By the definition clause of the Settled Land Act, 1882 (s. 2, sub-s. 9), capital money arising under the Act includes the "moneys receivable for the trusts and purposes of the settlement," which plainly includes purchase-money. Then s. 21 provides that "Capital money arising under this Act, subject to payment of claims properly payable thereout . . . . shall, when received, be invested or otherwise applied wholly in one, or partly in one and partly in another or others, of the following modes"; then follows a list of ways in which capital moneys may be applied, and which of them is to be adopted depends on the direction of the tenant for life. It is contended that the effect of the words "subject to claims properly payable thereout" is that the tenant for life is competent to receive the purchase-money, pay any claims properly payable thereout, and pay the balance to the trustees, and that

the trustees have nothing to do with the payment of incumbrances which have priority over the settlement. I cannot take that view. The purchase-money is capital money arising under the Act and must go to the trustees for the purpose of being applied according to the Act. They are the only persons who can give a discharge for it. Sect. 22, sub-s. 1, provides expressly "Capital money arising under this Act shall, in order to its being invested or applied as aforesaid, be paid either to the trustees of the settlement or into Court, at the option of the tenant for life, and shall be invested or applied by the trustees or under the direction of the Court." In this case the purchaser, the present vendor, did not pay the purchase-money either to or by the direction of the trustees or into Court. He paid to the tenant for life and it was applied without any reference to the trustees. In my opinion the tenant for life could not give the purchaser a good discharge, and as he got no good discharge, it is possible that there may be a lien in favour of the trustees and the tenant for life or one of them. The purchaser at the present sale takes the objection that as the conveyance was made without the concurrence of the trustees there may be a lien for the purchase-money. I think that is a good objection. The order must be "The Court being of opinion that requisition 4 has not been sufficiently answered dismiss the summons with costs."

Solicitors: *E. C. Rawlings & Butt, for Rutter & Rutter, Wincanton; W. J. Lake, for A. Fisher, Tiverton.*

J. R. B.

NEVILLE J.

1909

May 6.

SALAMAN *v.* HOLFORD.

[1909 S. 620.]

Landlord and Tenant—Lease at Rack Rent—Lessor's Covenant to pay all present and future Rates and Taxes—Sub-letting at a Profit—Increased Assessment to Rates and Taxes—Liability of Lessor.

The four upper floors of a building were demised for a term of years at one inclusive sum which was a rack rent, the lessee covenanting not to alter the premises and not to underlet any part thereof without the lessor's consent, and the lessor covenanting to pay all rates and taxes "now payable or hereafter to become payable in respect of the premises." The lessee afterwards separately sub-let each floor at rents which gave him a profit rental, and the lessor sanctioned the sub-leases. The assessment to rates and taxes of the demised premises was subsequently increased in consequence of the lessee having sub-let at a profit:—

Held, that the lessor's liability under his covenant was not limited to the assessment existing at the date of the lease, but extended to the increased assessment.

Adjourned Summons.

By deed dated August 2, 1899, N. Salaman devised to one Singer all the upper part, being the first, second, third, and fourth floors, of premises known as Nos. 10 and 10A, New Bond Street, in the county of London, to hold the same from September 29, 1899, for the term of twenty-one years at the yearly rent of 300*l.*, clear of all deductions, payable quarterly on the usual quarter days; and the lessee covenanted (amongst other things) to pay "the inhabited house duty payable in respect of the whole of the said premises Nos. 10 and 10A, New Bond Street"; not to make any alteration or addition whatsoever in or to the demised premises without the written consent of the lessor; and also not to assign or underlet the demised premises or any part thereof without the previous licence in writing of the lessor, such licence not to be arbitrarily withheld in the case of a responsible and respectable tenant; and the lessor covenanted that he would during the said term "pay all rates, taxes, duties and outgoings (including water rate) now payable or hereafter to become payable in respect of the said premises except inhabited house duty as hereinbefore provided."

At the date of this deed the basement and ground floor of the

premises were let to other parties, and no part of the premises was separately assessed to rates and taxes, but the premises were assessed as a whole at 550*l.* net rateable value, and the proportion of the 550*l.* attributable to that part of the premises comprised in the said lease to Singer was 194*l.*

In August, 1901, Singer sub-let the second floor for fourteen years at the yearly rental of 130*l.*, and in February, 1903, he sub-let the first floor for fourteen years at the yearly rent of 200*l.*

In May, 1903, Singer for valuable consideration by deed assigned the premises comprised in his lease of August 2, 1899, to one Heinke.

In September, 1903, Heinke sub-let the fourth floor for three years at the yearly rent of 100*l.*, and in March, 1904, he by deed assigned the lease of August 2, 1899, to John Holford.

In August, 1904, John Holford died, and the defendant proved his will as sole executrix.

In March, 1905, the defendant sub-let the third floor on a yearly tenancy at a rental of 80*l.* per annum.

All the above assignments and undertakings were sanctioned by the lessor, N. Salaman, who subsequently died, and the plaintiffs were the trustees of his will.

Under the quinquennial revaluation of the premises made in July, 1905, by the assessment committee, each of the floors demised by the lease of 1899, as well as the ground floor and basement, were separately assessed to rates and taxes at sums amounting in the aggregate to 732*l.*; and the proportion of the assessment attributable to the premises comprised in the lease of August 2, 1899, was 293*l.*, being 99*l.* in excess of 194*l.*, at which those premises were assessed at the date of that lease.

In 1909 the plaintiffs took out a summons to determine the question whether their lessor's aforesaid covenant made his estate liable to pay the whole of the increased rates and taxes. There was evidence that the increase in the rates and taxes was largely, if not entirely, due to the fact that the lessees had sub-let the floors at profit rentals.

Peterson, K.C., and *Foà*, for the plaintiffs. No doubt the covenant is expressed in wide and general terms, but the

NEVILLE J. 1909 SALAMAN v. HOLFORD.

authorities shew that it must be construed reasonably, and that where improvements are made by the tenant after the granting of the lease the lessor ought not to pay the increase in the assessment: *Watson* v. *Home* (1); *Smith* v. *Humble* (2); *Mansfield* v. *Relf.* (3)

[NEVILLE J. Those were cases of building leases.]

The present is a much stronger case, because in each of those cases the parties contemplated improvements. Here the lease is at a rack rent and improvements were not contemplated. The incidence of the taxes where the tenant agrees to pay them is shewn in *Whitfield* v. *Brandwood* (4); *Yeo* v. *Leman* (5); *Hyde* v. *Hill* (6); *Graham* v. *Wade* (7); *Watson* v. *Atkins.* (8) The ratio decidendi is that the burden is to be in proportion to the benefit received, and where the tenant gets an advantage by subletting at a profit which increases the assessment the landlord ought not to pay the increase in the assessment. In Woodfall's Landlord and Tenant, 18th ed. p. 636, the cases are summarized as follows: "When a lessor covenants to pay any rate or tax, or it is specifically excepted from the lessee's covenant, and the annual value of the premises is afterwards increased by alterations or new buildings, the landlord is liable to pay, not the whole rate or tax as paid from time to time by the tenant, but only so much thereof as his rent or the annual value of the premises when demised bears to the improved annual value." It is submitted that the same principle applies to the present case.

Butcher, *K.C.*, and the *Hon. M. Macnaghten*, for the defendant, were not called upon.

NEVILLE J. The authorities shew clearly that in certain cases, notably in the case of a building lease, or where the immediate rent received from the premises is what is called an improved rent, a covenant on the part of the landlord to pay rates and taxes has had given to it a conventional meaning which it is not

(1) (1827) 7 B. & C. 285.
(2) (1854) 15 C. B. 321.
(3) [1908] 1 K. B. 71.
(4) (1818) 2 Stark. 440.
(5) (1743) 2 Str. 1191.
(6) (1789) 3 T. R. 377.
(7) (1812) 16 East, 29.
(8) (1820) 3 B. & Ald. 647, 650.

easy to reconcile with the words of the covenant, but which has been adopted in those cases where the rule of construction applies.

In the present case the question really is whether I ought to apply that rule of construction to a lease for twenty-one years at a rack rent containing a covenant by the lessee not to make any alteration in the premises except with the leave of the landlord, and a covenant by the landlord that he will, during the term, "pay all rates, taxes, duties and outgoings (including water rate) now payable or hereafter to become payable in respect of the said premises," and so on. Now I gather that the ground upon which the rule of construction to which I have referred was originally based was that to hold otherwise would be to attribute to the contracting parties an essentially unreasonable intention, inasmuch as the consideration which on the verbal construction of the covenant the lessor would be giving would be altogether out of proportion to the consideration which he was getting. Indeed the result might be that he would be left with a burden instead of a benefit as the result of parting with his land. In the present case I see nothing unreasonable in supposing that the landlord, the lessor, did intend to undertake the payment of all the rates and taxes specified throughout the continuation of the term. I think where an improved rent is not in the contemplation of the parties, and where in fact an improved rent in the ordinary sense of the term cannot be obtained because a covenant in the lease prevents alteration of the premises, there is no reason why the language of the covenant should not be construed in accordance with its ordinary meaning. I think upon this footing it is clear that the landlord has undertaken the burden of paying all the rates and taxes, and that that burden continues notwithstanding the fact that by reason of either an unduly low assessment at the time when the lease was made, or an improvement in the value of the premises, or a general rise in the value of property in the neighbourhood, an increased assessment subsequently made adds to his burden and does not impose any burden upon the lessee. These covenants are of late years of very frequent occurrence in the letting of flats and parts of houses, and there is no case which has been cited

NEVILLE J. 1909 SALAMAN v. HOLFORD.

to me in which the rule of construction has been applied to the case of a lease such as that which I have before me. I think, therefore, that the summons fails and must be dismissed with costs. There will be a declaration that upon the true construction of the lease and in the events which have happened the covenant extends to the increased rates now payable in respect of the demised premises.

Solicitors: *Emanuel, Round & Nathan; Harper, Battcock & Co.*

H. L. F.

PARKER J. 1909 *March* 3, 4, 26.

In re HATSCHEK'S PATENTS. *Ex parte* ZERENNER.

Patent—Revocation—Patented Article or Process manufactured or carried on exclusively or mainly out of United Kingdom—Patents and Designs Act, 1907 (7 *Edw.* 7, *c.* 29), *ss.* 24, 27.

Sect. 24 of the Patents and Designs Act, 1907, deals primarily with cases where the trade of this country has been injured by an abuse of the monopoly conferred by the patent, irrespective of anything which is being done abroad, while s. 27 deals primarily with cases where the object or effect of the use of such rights in the way they have been used has been to favour the development of industries abroad at the expense of industries in the United Kingdom.

The keynote of s. 27 is forfeiture of the patent for the abuse of the monopoly at the instance of a common informer, and any one, whether a foreign or a British subject, and whatever his motive, can, by satisfying the Comptroller of the existence of the circumstances contemplated in sub-s. 1, throw on the patentee the onus of proving, to prevent revocation, that the patented process or article is carried on or manufactured to an adequate extent within the United Kingdom, or of giving a satisfactory reason why it is not so carried on or manufactured.

Sect. 27 does not mean that in every case where more than 50 per cent. of the patented articles manufactured anywhere are made abroad the patentee can be called upon to defend his patent rights; if the article is manufactured in the United Kingdom to as great an extent as can reasonably be expected, having regard to the industrial development of other countries, no presumption against the patentee arises.

Sect. 27, sub-s. 1, institutes a comparison between the extent to which the article or process is manufactured or carried on in this country and the extent to which it is manufactured or carried on abroad, whether the articles are or are not imported into this country, and the section is meant to hit every abuse of the patentee's monopoly the object or result

of which is to benefit foreigners at the expense of traders within the United Kingdom.

In determining whether there has been "adequate" manufacturing in the United Kingdom, or whether "satisfactory reasons" for the inadequacy are given by the patentee, it is left to the Comptroller, subject to appeal to the Court, to determine in each case, and having regard to all the circumstances, whether the home manufacture is adequate, or, if not, whether the reasons are satisfactory, he bearing in mind (*a*) that that manufacture is not adequate if it is lessened by the patentee exercising his patent rights to the hurt of British industry—e.g., by giving foreign traders a preference as to licences or otherwise over British traders—and (*b*) that reasons are not satisfactory which do not account for the inadequacy of the home manufacture by causes operating irrespective of any abuse of the monopoly.

On the other hand, a patentee who has allowed part of the demand in this country to be supplied by the importation of goods from abroad has not necessarily precluded himself from proving that there is adequate home manufacture or giving satisfactory reasons for the inadequacy of that manufacture, the policy of s. 27 being to secure fair play between foreign and British industries.

Statement of matters which may be considered in determining whether home manufacture is adequate, and what are satisfactory reasons for the inadequacy of that manufacture.

Sect. 27 applies both to patents in existence before the Act of 1907 and patents subsequently granted, although reasons might be accepted as satisfactory in the case of the former which would not be so accepted in the latter; but the fact that a patentee has before the Act precluded himself by licence or contract from working his patent in this country is not a satisfactory reason.

Observations on the then existing rules of procedure as to applications for the revocation of patents.

In 1900 two patents were granted to H. for inventions relating to a process of manufacturing imitation stone slabs. The invention was in commercial operation in Germany, France, and Belgium, but was never worked in the United Kingdom. The patentee devoted himself to the establishment abroad of industries in which the patented process was carried on, and used his monopoly to secure to a Belgian company, to whom in 1905 he granted an exclusive licence for the United Kingdom, the monopoly of selling in the United Kingdom articles manufactured by the company in Belgium :—

Held, affirming the Comptroller's decision, that the patent ought to be revoked forthwith, although in July, 1908, the patentee and the Belgian company had issued newspaper advertisements in the United Kingdom expressing their willingness to sell or enter into working arrangements for the manufacture of goods in the United Kingdom under the patented process.

LETTERS patent (No. 6455 of 1900) were on April 6, 1900, granted to Ludwig Hatschek, of Voeklabruck, Upper Austria,

PARKER J. 1909

HATSCHEK'S PATENTS, *In re.* ZERENNER, *Ex parte.*

for a process of manufacturing imitation stone plates, slabs, or tiles. Other letters patent (No. 22,139 of 1900) were on December 5, 1900, granted to the same person for a similar invention. No manufacturing under either patent was ever done in the United Kingdom.

On January 26, 1906, Hatschek granted a licence under both patents to a Belgian company called the Société Anonyme Eternit. By the terms of this licence the patentee was precluded from granting any one else a licence to manufacture in the United Kingdom. The Belgian company built and equipped a factory in Belgium for the manufacture of the slabs, and as from April, 1906, there manufactured the slabs.

In pursuance of instructions received on July 13, 1908, advertisements were inserted in various British newspapers intimating that the owners of the patents were desirous of disposing of the same or entering into a working arrangement with firms in Great Britain likely to be interested in the patented process.

C. W. Zerenner, a merchant in the City of London, applied to the then Comptroller-General, under s. 27 of the Patents and Designs Act, 1907 (1), for revocation of the patents on the ground

(1) 7 Edw. 7, c. 29, s. 27, is as follows:

"(1.) At any time not less than four years after the date of a patent, and not less than one year after the passing of this Act, any person may apply to the Comptroller for the revocation of the patent on the ground that the patented article or process is manufactured or carried on exclusively or mainly outside the United Kingdom.

"(2.) The Comptroller shall consider the application, and, if after inquiry he is satisfied that the allegations contained therein are correct, then, subject to the provisions of this section, and unless the patentee proves that the patented article or process is manufactured or carried on to an adequate extent in the United Kingdom, or gives satisfactory reasons why the article or process is not so manufactured or carried on, the Comptroller may make an order revoking the patent either—

"(*a*) forthwith; or

"(*b*) after such reasonable interval as may be specified in the order, unless in the meantime it is shown to his satisfaction that the patented article or process is manufactured or carried on within the United Kingdom to an adequate extent:

"Provided that no such order shall be made which is at variance with any treaty, convention, arrangement, or engagement with any foreign country or British possession.

"(3.) If within the time limited in

that they had not been worked in the United Kingdom. The patentee and the Belgian company both opposed the application, but the then Comptroller (Sir C. N. Dalton), on December 9, 1908, made an order revoking the patents. (1)

The patentee and the Belgian company appealed to the Court from the decision of the Comptroller, and the appeal was heard before Parker J. on March 3 and 4, 1909.

Astbury, K.C., and *A. B. Shaw*, for the appellants. The Comptroller has entirely misconstrued s. 27 of the Patents and Designs Act, 1907, and has misconceived the purpose of the Act as a whole. His decision amounts to this—that, irrespective of any other circumstances, a patent should be revoked if the process is carried on to a greater extent abroad, or more articles are made under it abroad than in this country. After the date of the licence to the Belgian company it became impossible for the patentee to manufacture the patented article in this country or to authorize any one else to do so. The Legislature never intended that the Act should be a punitive measure, depriving the patentee of his patent unless within a year from the passing of the Act he manufactured a larger amount of patented articles in this country than abroad; and it was never intended that licences granted, for valuable consideration, before the Act was passed should be cancelled. Neither s. 27 nor any other section of the Act places any obligation on the patentee to manufacture in this country or anywhere else. In the present case the patentee could not, consistently with his licence, have manufactured here without the licensees' consent, and every opportunity has been given by the patentee and licensees to other persons

---

the order the patented article or process is not manufactured or carried on within the United Kingdom to an adequate extent, but the patentee gives satisfactory reasons why it is not so manufactured or carried on, the Comptroller may extend the period mentioned in the previous order for such period not exceeding twelve months as may be specified in the subsequent order.

"(4.) Any decision of the Comptroller under this section shall be subject to appeal to the Court, and on any such appeal the law officer or such other counsel as he may appoint shall be entitled to appear and be heard."

(1) (1908) 26 Rep. Pat. Cas. 1.

PARKER J. 1909 HATSCHEK'S PATENTS, *In re.* ZERENNER, *Ex parte.*

who may wish to manufacture in this country on reasonable terms. It is sufficient to shew, as it is shewn, that the British market is adequately supplied with the article manufactured under the patent. If a man prior to the date of the Act had spent a large sum in building a factory here to manufacture goods under a patent, then valid, it would not be right now to revoke the patent because larger quantities of the goods than he manufactured here were made abroad. The Comptroller disregards the fact that the British market is supplied with as much as it wants, and thinks that revocation must follow unless more than 50 per cent. of the manufacturing takes place in the United Kingdom.

Sect. 27 is difficult to construe. There is nothing in the Act to explain what is meant by manufacturing "to an adequate extent," or to shew to whom reasons for inadequate manufacturing are to be "satisfactory," and the proper way to construe the section is to inquire, first, what the previous law was; secondly, what evil was aimed at; thirdly, what remedy is given; and, fourthly, the reason of the remedy: *Heydon's Case* (1); *Eastman Photographic Materials Co.* v. *Comptroller-General of Patents.* (2)

The section was inserted in the interest of the manufacturing portion of the British community, and s. 24 was inserted in the interest of the consumer, and the two interests are totally different. It is immaterial to the consumer whether the goods are made in this country or imported from abroad. The statute was not meant to create a great wrong by depriving people of their property on account of something which they cannot help. The Comptroller has taken the real or supposed breach of what may be the provisions of s. 24 in the interest of one body of people and applied them for the purpose of assuming jurisdiction under s. 27.

Sect. 24, referring, like s. 3 of the Patents Act, 1902, to the granting of compulsory licences, is aimed at satisfying the reasonable requirements of the public, but s. 27 has nothing to do with that. Those who suffer by an insufficient supply of the article are sufficiently protected by s. 24.

(1) (1584) 3 Rep. 7 a. (2) [1898] A. C. 571, 573.

Sect. 27 is different. "Any person," not merely "any person interested," may apply. To keep off busybodies the applicant is required to make out a prima facie case that the patented article or process is manufactured or carried on exclusively or mainly outside the United Kingdom before he can discuss the matter at all. When he has made out that case, the Comptroller has no jurisdiction to do anything if the patentee either proves adequate manufacturing or carrying on in the United Kingdom or shews satisfactory reasons for the inadequacy. It is only where inadequacy is apparent that reasons for it must be shewn. There are many cases where from the nature of the article it is impossible to work the process in England, but that fact would not justify a revocation of the patent, and it would be a satisfactory reason within the meaning of s. 27. Other good reasons would be that the articles could be manufactured more cheaply abroad, and that British consumers preferred or were satisfied with the article made abroad. In the face of his licence the patentee could not manufacture here without the licensees' consent.

[PARKER J. Have you considered the definition in s. 93, which provides that "in this Act, unless the context otherwise requires, ... 'patentee' means the person for the time being entitled to the benefit of a patent"?]

That may include the licensee, but it cannot exclude the patentee himself; he gets, in the shape of royalties, the benefit of the patent. The right to the royalties is destroyed by revoking the patent, and yet he cannot manufacture here without leave or subjecting himself to an injunction. A more satisfactory reason for making a thing abroad than that the patentee has contracted himself out of the right to make it here cannot be given.

[PARKER J. The patentee and the licensee together can manufacture here.]

But the patentee alone cannot do it, and if the licensee will not let him, the patentee ought not to suffer.

The Act is retrospective; and a retrospective enactment is not construed as destroying vested rights unless it contains express words to that effect: *Hough* v. *Windus* (1); *In re Athlumney*. (2)

(1) (1884) 12 Q. B. D. 224, 237.

(2) [1898] 2 Q. B. 547, 552.

PARKER J. 1909 HATSCHEK'S PATENTS, *In re.* ZERENNER, *Ex parte.*

[PARKER J. The section must disturb vested rights to some extent, because any one who has taken out a patent and paid fees for it, or has taken an assignment of it for value, has done it on the footing of the old law.]

But the vested rights must not be touched further than the Act expressly affects them. Where the Act provides for the determination of existing contracts it requires compensation to be paid: see s. 38, sub-s. 2. The whole point of s. 27 is that manufacturers in this country who want to put a process into operation here shall not be unreasonably prevented from doing so by the patentee. In this case by advertising the best means have been taken of inquiring whether any one wants to manufacture here, and there has been no response. It is only where there is inadequacy and no satisfactory reason that the Comptroller has power to act, and even then he can only act with discretion as to whether he shall revoke forthwith or after a further opportunity has been given to the patentee. The revocation of the patent will destroy the object which the section has in view.

The Comptroller was wrong in refusing to give time to the patentee, although he had power not only to give time, but to extend the time. What he has done tends to discourage foreigners from bringing their valuable inventions to this country. If they patent them abroad only, the English manufacturer will not necessarily be able to avail himself of them, for it is not necessary, at any rate in Germany, to make public the details which must be disclosed in this country. Sect. 27 was passed primarily with the view of fostering manufacture in this country. Some persons are said to have taken the view that it was a sufficient compliance with the law to publish the details of an invention in the specification, so that others could use it at the end of fourteen years, but others held the view that a further burden was imposed by the Statute of Monopolies.

[PARKER J. Was there not some old doctrine that patent rights could not be enforced unless the patentee had worked under the patent in this country?]

We are not aware of such a doctrine. For many years it has been settled that whoever has the right to give may give upon

any terms he likes to make. There is no obligation, under the Statute of Monopolies, on any patentee to manufacture.

As there has been no manufacturing in this case in England, one need not discuss the meaning of "adequate" extent, and we rely on the ground that satisfactory reasons for not manufacturing here are shewn.

[PARKER J. Sect. 6 of the Statute of Monopolies excepts from the enactment in favour of patents those which are "contrary to the law" or "mischievous to the State by raising prices of commodities at home, or hurt of trade, or generally inconvenient." I suppose you contend that the object of s. 27 was to prevent patents being used to the hurt of trade, and that, as the consumer's point of view is not the same as the trader's, the patentee might work his patents for the benefit of the consumer but to the hurt of trade, and that the rise in price of commodities at home is unproportionate to the good you get from the trade.]

Yes. The fact that the Statute of Monopolies contemplated charging a royalty shews that something reasonable may be added to the price.

[PARKER J. That is to say, is the public paying too much for the real or supposed advantages of the increase in trade and the increase in the prospects of having inventions disclosed to it and the benefit of the disclosure which it can use when the patent expires?]

Yes. It is essential to any civilized country and to the existence of its manufacturers that all research and invention should be encouraged, but it is not desirable to pay such a price as will counteract any benefit thereby derived. Sect. 24 of the Act of 1907 is a redraft of the Act of 1902, which failed because it was necessary under it to go to the Privy Council, and s. 27 of the Act of 1907 was an additional provision to protect the manufacturers who wished to manufacture here, but not to destroy a patent, when no one wants to manufacture here, simply because the patentee is a foreigner.

[PARKER J. The section is not confined to foreigners.]

If it were, it would be a breach of the International Convention. But the section hits the foreigner harder than it does the

PARKER J. 1909

HATSCHEK'S PATENTS, *In re.* ZERENNER, *Ex parte.*

Englishman, because the latter, if he manufactures at all, usually manufactures in this country. If there is no manufacture anywhere the section does not apply.

The fact that by reason of climate, industrial population, raw material, or otherwise, things can be made more cheaply abroad is a satisfactory reason.

It is absurd to say that the patent should be revoked because 51 per cent. of the goods made under it are made abroad.

The reasons in this case are—(1.) the existence of a previous exclusive licence, granted when the law was different, and for a valuable consideration; (2.) the fact that the manufacture is cheaper abroad than in England; (3.) the fact that the licensees, having depleted their coffers to build a Belgian factory to supply the British market, cannot be expected to spend more money in building a factory here to supply a demand which is already adequately supplied from Belgium; (4.) the fact that no one wants to manufacture in this country.

The retrospective effect of the Acts requires strictness of interpretation. If persons here are dissatisfied with the price of the article their remedy is under s. 24.

[PARKER J. In construing s. 27 you arrive at different results if you regard the obligation of the patentee as one to use his patent for the purpose of protecting an industry in this country from the result at which you arrive if you regard his obligation as being to allow free trade, subject to charging reasonable royalties.]

The primary object is to remove improper fetters on trade. Sect. 27 was passed to prevent the abuse of patents, possibly bad, being taken out in this country by persons who will neither manufacture here nor let any one else do so on any terms, and who drive those who dare to manufacture into expensive litigation.

At any rate, if our reasons for non-manufacture are unsatisfactory, further time should be allowed to see whether manufacturing can take place in this country. [They also referred to Frost's Patent Law and Practice, 3rd ed. vol. i. pp. 23, 174.]

[PARKER J. In this case it is unnecessary to decide what

"adequate" means. All I have to decide is whether satisfactory reasons are given.]

R. Mortimer Montgomery, for Zerenner. If inadequate manufacture, or non-manufacture, in this country is shewn, the onus of shewing satisfactory reasons for the inadequate manufacture, or non-manufacture, is thrown on the patentee. "Satisfactory" means satisfactory from the public point of view, and that may include the occasionally conflicting views of the consumer and the manufacturer. The existence of the prior licence affords no reason, for it contemplated manufacturing in this country. To grant a licence to work abroad is not a fair way of treating the trade of this country. There is no evidence to shew that the only way to foster future manufacturing in this country is to maintain the patent; nor is there evidence that the actual cost of production here would be greater than it is in Belgium.

Nor is there any evidence that the Belgian company has so exhausted its funds that it is unable to build and equip a factory in this country. There is no ground for suggesting that s. 24 was passed solely with regard to the interests of consumers in this country and that s. 27 was passed to protect the interests of manufacturers here.

Manufacturing to an adequate extent does not necessarily mean manufacturing to an extent adequate to satisfy the demand for the goods within the jurisdiction, although it may mean having here a fair proportion of the total manufacture having regard to all the circumstances.

At the back of s. 27 there is the idea that if you have free trade conditions with regard to the manufacture of an article you will automatically find out whether it is economically useful and beneficial for the country that the manufacture of that article shall or shall not spring up there, but that if free trade conditions are entirely done away with by reason of a monopoly there is no such test; and the Legislature therefore thinks it only fair that the trade of the country should not be left absolutely at the mercy of particular patentees to say that manufacture shall take place in one country and not in another, and that patentees must be therefore controlled. The Legislature has

PARKER J. 1909 HATSCHEK'S PATENTS, *In re.* ZERENNER, *Ex parte.*

expressed itself rather vaguely, but it means that, unless satisfactory reasons are given for inadequate manufacture, or non-manufacture, here, the patent shall be revoked and free trade conditions shall exist. No reason is given here except the existence of monopoly rights in the patentee and his licensees. It is not enough to shew that you can manufacture rather more cheaply abroad; the patentee must shew that it is commercially impossible to manufacture in this country.

The contention that the Belgian factory satisfied s. 24, and that this made persons unwilling to manufacture here, is merely an assertion of the patentee's rights. There is no evidence that persons are not willing to manufacture in this country on reasonable terms. The first words of s. 27 shew that the section was meant to be retrospective.

It is useless to extend the time, where there is no suggestion that adequate manufacture in this country is probable at an early date. If time is given in this case, there is no reason why it should not be given in every case.

[PARKER J. You can imagine any number of cases where time should be given, but only with the object of securing working in this country—for instance where a man builds a factory and it is burnt down the day before the year mentioned in s. 27 expires.]

No case for further time is shewn here. The fact that permission is given to the Attorney-General to appear shews that the public interest is to be regarded.

Sargant (*Sir W. S. Robson, A.-G.*, with him), for the Attorney-General. The meaning of s. 27, sub-s. 4, is that the Attorney-General does not appear for the Comptroller, but appears in the way in which he would appear on an application for extension of a patent. In certain cases the Attorney-General might feel it his duty not to support the Comptroller's decision.

[PARKER J. I think that is right, because the Comptroller really is the Court of first instance.]

Here the Attorney-General supports the decision, although generally he does not wish to interfere as regards existing patents, except so far as the Act compels an interference with vested interests.

[PARKER J. I rather dislike the expression "vested interests," because under the form of patent granted up to the date of the last Act the patent was always revocable if it proved to be generally inconvenient, and if this is simply a case where the patent is generally inconvenient under the old rights of the patentee, there is not an interference with a vested interest.]

If the law was not clear before, the Act introduces a fresh condition affecting both future and existing letters patent. As regards the question whether s. 27 is meant to protect free trade or to protect the British manufacturer, assume it could be shewn —and the onus to do so is on the patentee—that under conditions of absolute free trade, and where there was no patent, the manufacture could not flourish in this country, the Court is not asked now to say that the section means to throw on the patentee the obligation of so using his monopoly as to make the manufacture flourish here. On the other hand, it is contended that the Act is intended to prevent the foreign manufacturer from so using the monopoly granted to him in England as to put the British manufacturer at a disadvantage and prevent him from manufacturing fairly and in competition. There may be some case between the two as to which it may be desirable to reserve anything which might be said.

Sect. 27 is to some extent a manufacturers' section, but it does not follow that it is not ultimately for the benefit of the public. It is immaterial that there is no obligation on the patentee to work under his patent. The Act attaches a new condition to the privilege, namely, that the patentee must do something, and it does not matter a straw that there is no separate obligation to do anything. Without attempting to say what are "satisfactory reasons," it is submitted that they are divisible into two classes, the permanent, as in the case of climatic conditions, and temporary, as in the case of general financial depression, the poverty of the patentee, or the necessity of interesting some wealthy manufacturers. The temporary reason would not take away the right to revoke, but would be a ground for extending the time. In either case the onus of shewing a satisfactory reason is on the patentee.

Unfairness to the British manufacturer may be shewn not

PARKER J. 1909 HATSCHEK'S PATENTS, *In re.* ZERENNER, *Ex parte.*

only by the strict exercise of patent rights, but also by giving a personal preference to foreigners. The sort of proof which the patentee has to give is to some extent similar to the proof he has to give on applying for a prolongation of his patent. For instance, he must shew that he has made efforts to get the manufacture established here equal at least to the efforts made abroad. The advertisements here were issued very late, and they were very vague.

Where a licence has been granted, even before the Act, the patentee ought at any rate to shew that he has made efforts to come to terms with his licensee as to permitting manufacture in this country.

Apart from exceptional cases, the patentee and the licensee should be regarded as together forming the patentee for the purposes of s. 27. In the present case there has been no serious attempt to work in this country as compared with what has been done in Belgium, and the Act contemplates that at least an equal opportunity should be given to the Britisher. The reasons for not working are permanent, and there would be no object in extending the time.

The Comptroller did not lay down that whenever 51 per cent. of manufacture takes place abroad the patent must be revoked, but that the jurisdiction depended on such a condition, and that when it existed the patentee was put on his defence.

In the present case the Court has not to decide what is manufacturing to an adequate extent.

A. B. Shaw, in reply. It is necessary to decide here what is manufacturing to an "adequate extent." The words are different from those in the earlier part of the section, namely, "exclusively or mainly." "Adequate" is something different from "mainly," and there may be adequate manufacture here, although it is much less than 50 per cent. of the total manufacture. If a patent is not worked at all, the case is not within the section, which only begins to apply where the patent is worked exclusively or mainly outside the United Kingdom.

[PARKER J. If a process was patented by an Englishman in this country only, but was worked in a country where it was not patented, and the patentee deliberately refrained from working

here because of some advantage he would get from persons abroad through importation, then the case might be within the section.]

That would be a serious question. The Court has a discretion as to revoking the patent. This case is quite different from a case in which the licence is granted after the Act. [He also referred to *Badische Anilin und Soda Fabrik* v. *W. G. Thompson & Co.* (1)]

Cur adv. vult.

March 26. PARKER J. Before dealing with the facts of this particular case, I propose to make certain observations on the construction to be placed upon s. 27 of the Patents and Designs Act, 1907. I think this course will be convenient, not only for the purposes of the proceedings now pending before the Comptroller, but for the enlightenment of patentees whose patents may hereafter be attacked under the provisions of this section, and who at the present moment labour under the disadvantage of not knowing certainly the circumstances in which such an attack is possible or the nature of the evidence to be adduced to meet it. Some of the points on which I shall touch were not raised in this case, but they have been argued fully in another case (2) which I have had before me, and which I have adjourned for further evidence, and I have devoted considerable time to a study of the section, being fully aware of its importance both to patentees and to the public.

Whatever difficulty there may be in ascertaining the precise meaning of some of the expressions in s. 27, it is at least clear that a patentee, since that section became law, cannot be certain of retaining his patent rights after the period mentioned in the section, unless his patented process is being worked or his patented article is being manufactured within the United Kingdom to an extent which the section describes as adequate, or unless he can give satisfactory reasons why this is not the case. The mischiefs which s. 27 and s. 24 of the Act were intended to meet are well known. It was felt to be intolerable

(1) (1904) 21 Rep. Pat. Cas. 473.
(2) *In re Bremer's Patent, In re Högner's Patent, Ex parte Braulik*, May 25, to be reported next month.

PARKER J. 1909

HATSCHEK'S PATENTS, *In re.* ZERENNER, *Ex parte.*

that letters patent for inventions which create monopolies, and are therefore in themselves contrary to the spirit of the common law as being restraints on trade, and which were only excepted from the operation of the Statute of Monopolies for the encouragement of trade and inventions useful in trade, and in consideration of the disclosure of such inventions to the public, should be used (as they had in fact been used) to prevent the development of new industries or to fetter existing industries in this country.

Sects. 24 and 27 of the Act are intended to prevent this being any longer possible. Sect. 24 deals primarily with cases where the trade of this country has been injured by an abuse of the monopoly conferred by the patent, irrespective of anything which is being done abroad. Sect. 27 deals primarily with cases where the object or effect of the use of such rights in the way they have been used has been to favour the development of industries abroad at the expense of industries in the United Kingdom. The sections may sometimes overlap, but this is the broad dividing line between them.

The scheme of s. 27 considered as a whole is quite simple, but for all its simplicity it is exceedingly drastic. Any one, whether having any real interest in the development of British industries or not, whether a foreigner or a British subject, and whatever be his motive, can, by satisfying the Comptroller of the existence of the state of circumstances contemplated in sub-s. 1, impose on a patentee the onus of justifying the use he has made of his monopoly—the onus of proving, in order to save his patent from revocation, that his patented process is carried on or his patented article manufactured to an adequate extent within the United Kingdom, or of giving a satisfactory reason why it is not so carried on or manufactured. The keynote of the section is, in my opinion, forfeiture for abuse of the monopoly at the instance of even a common informer, the abuse being in certain circumstances presumed unless otherwise disproved.

The first question is this: What is the state of circumstances the existence of which imposes this serious liability on a patentee? In the words of sub-s. 1, it is whenever "the patented article or

process is manufactured or carried on exclusively or mainly outside the United Kingdom." There is no difficulty in the use of the word "exclusively," but the use of the word "mainly" gives rise to difficulty. The sub-section may, and it was argued that it did, include every case in which the patented article or process is manufactured or carried on to a greater extent outside than inside the United Kingdom. If this be its true meaning, then in every case in which more than 50 per cent. of the patented articles manufactured anywhere are manufactured abroad, the patentee can be called upon to justify the use he has made of his monopoly and defend his patent rights. I cannot think that this is the true meaning of the sub-section. However great may be one's belief in the industrial supremacy of the inhabitants of these islands, it would, nowadays at least, be somewhat arrogant to assert that wherever the manufacture of a patented article in the United Kingdom is less than one half of the total manufacture of the whole world there arises a presumption that British trade has not had fair play—a presumption that the patentee has been abusing his monopoly. If the patented article be manufactured in the United Kingdom to as great an extent as can reasonably be expected, having regard to the industrial development of other countries, I do not think any presumption against the patentee can fairly arise, nor do I think that the Legislature intended it should arise. The word "mainly" is used in the sub-section in close connection with and as an alternative to "exclusively," and, having regard to this fact, I do not think that a process or article can be said to be mainly carried on or manufactured abroad merely because it is carried on or manufactured abroad to a somewhat greater extent than within the United Kingdom. For example, if the total manufacture in the United Kingdom were 1200 and the total manufacture elsewhere 1250, giving a total of 2450 in all, I do not think it could be said that the manufacture was mainly abroad within the meaning of the section; to come within the sub-section the disparity must, in my opinion, be greater than a mere small percentage, and, indeed, if the article be manufactured or the process be carried on within the United Kingdom, not only to a substantial extent, but to an extent as substantial as may

PARKER J. 1909 HATSCHEK'S PATENTS, *In re.* ZERENNER, *Ex parte.*

reasonably be expected having regard to what is done abroad, I do not think the state of circumstances is that contemplated by sub-s. 1.

It was further argued before me that sub-s. 1 institutes a comparison, not between the extent to which an article or process the subject of a British patent is manufactured or carried on in this country and the extent to which it is so manufactured or carried on abroad, but between the number of articles made abroad, either in accordance with the specification or by means of the process described in the specification, and imported into this country and the number of such articles so made in this country. This argument was based on the use of the word "patented," it being contended that the use of this word shewed that the Legislature was only referring to what was done within the area of the monopoly created by the patent, and that the manufacture of the articles or the carrying on of the process abroad did not come within the area of the monopoly unless and until the goods manufactured, or the goods resulting from the process, were imported into this country. I cannot conceive that if the Legislature had meant this it would not have said it in plainer words.

In my opinion the sub-section institutes a comparison between the extent to which the article or process the subject of the patent is manufactured or carried on in this country and the extent to which it is manufactured or carried on abroad, whether the articles so manufactured or resulting from the process so carried on abroad are or are not imported into this country. I have come to this conclusion the more easily because the real strength of the argument to the contrary consisted in considering how far-reaching would be the effect of the section if I gave the words in question their prima facie meaning and at the same time held that, wherever the article or process was manufactured or carried on to a greater extent abroad than in the United Kingdom, the case was within sub-s. 1. As I have already held that this is not so, there is nothing to justify me in departing from the plain words.

It has been suggested also that the sub-section institutes a comparison between what is being done abroad and at home respectively by the patentee, his licensees and agents, and that

what is done otherwise may be left out of account. I cannot think that is the true meaning of the section. Suppose the patentee had no foreign patents, and yet, for some reason of his own, chose to prevent an industry arising here, while industries in the patented article or process were being developed abroad, I think the section would apply. It seems to me that the section is meant to hit any abuse of the monopoly the object or result of which was to benefit foreigners at the expense of traders within the United Kingdom.

I will pass now to the other sub-sections, assuming that the applicant has satisfied the Comptroller that the state of circumstances contemplated by the first sub-section has arisen. The patentee is then clearly on his defence, and must either prove that the article or process is manufactured or carried on in the United Kingdom to an adequate extent or give satisfactory reasons why it is not so manufactured or carried on. The difficulty in construing these provisions arises from the use of the somewhat elastic expressions "adequate" and "satisfactory," the meaning of which depends largely on the point of view from which the facts which may be proved are considered. In my opinion the Legislature has used these somewhat vague expressions advisedly, it being left to the Comptroller, subject to an appeal to the Court, to determine in each case, and having regard to all the circumstances, whether the extent to which the article or process is manufactured or carried on is adequate, and, if not, whether the reasons put forward are satisfactory. I shall not therefore attempt to define the meaning of these expressions, but in considering any case which may arise there are, in my opinion, one or two general considerations which ought to be borne in mind.

First, as I have already said, the patentee is on his defence, and, this being so, I do not think the extent to which the article is manufactured, or the process carried on, can be considered adequate if it is less than it would have been but for the fact that the patentee has exercised the rights conferred by his patent to the hurt of British industry—for example the fact that he has given foreign traders a preference over British traders.

PARKER J.
1909
HATSCHEK'S PATENTS, *In re.* ZERENNER, *Ex parte.*

Similarly I do not think that any reasons can be satisfactory which do not account for the inadequacy of the extent to which the patented article is manufactured or the patented process is carried on in this country by causes operating irrespective of any abuse of the monopoly granted by the patent. The first thing, therefore, for the patentee to do is, by full disclosure of the manner in which he has exercised his patent rights, to free himself from all suspicion of having done anything to hamper the industry of the United Kingdom. When once he has satisfied the Comptroller of this he will have gone a long way towards proving what he has to prove, and, even if he cannot prove adequacy, ought to be able to shew satisfactory reasons for inadequacy. This construction of the Act is in accordance with article II. of the 1902 Convention, which provides that no patent is to be revoked in any country which is a party to the Convention until three years at least from the date of application for the patent, and then only if the patentee cannot shew reasonable cause for his inaction. It is therefore the conduct of the patentee which is in question. Has he done anything which he ought not to have done, or omitted to do anything which he ought to have done, having regard to his obligations towards the traders of this country?

In considering the conduct of a patentee various questions may arise as to whether he has or has not exercised his rights fairly and properly, having regard to the interests of the trade of the United Kingdom, and for the most part these questions must be decided with reference to all the circumstances of the particular case, including, I think, the nature of the patented invention. But a patentee certainly ought not to give foreigners any preferential terms in the grant of licences or otherwise, nor ought he to utilize the period prescribed by sub-s. 1 in developing foreign industries as opposed to the industries of the United Kingdom, and at the end of the period seek to defend his conduct by offering to grant licences in this country on the same terms as he has granted them abroad. If he exercises his rights in such a way as to give other countries four years' start of this country in developing a new industry, he is not, in my opinion, exercising his rights fairly as regards the trade of this country.

He must at least take the same pains to develop the new industry here as he does abroad.

The question was much discussed as to whether anything more could be required of a patentee than to deal with this and other countries on the same terms and in the same manner, or whether the patentee is bound to exclude foreign goods altogether for the benefit of the trade of this country. It was argued that the mere fact that a patentee has allowed goods made abroad, whether under the patent or resulting from the patented process, to be imported into this country and to compete in this country with goods made here is an improper use of his patent rights. In other words, it was argued that the policy of s. 27 is not only to secure fair play for the traders of the United Kingdom, but to give such traders a preference over foreign traders and prevent the latter from entering into competition with the former on equal terms so far as the patentee can, by an exercise of his monopoly, secure inequality. This argument in effect asserts that the policy of the Act is a protective and not a free trade policy. Whatever be one's own personal views as to the advantage or disadvantage of a protective policy compared with a free trade policy, I am not prepared to hold that a patentee who has allowed part of the demand in this country to be supplied by the importation of goods from abroad has necessarily precluded himself from proving that the manufacture of the patented article, or the use of the patented process, in this country is adequate within the meaning of the 27th section, or from giving satisfactory reasons why it is not adequate. If this had been the meaning of the Legislature, I think that on so important a matter of principle clearer words would have been used. The policy of the section appears to me to be directed to securing fair play between foreign industries and the industries of this country, and not to securing for the latter during the period of the patent a protection which they would not enjoy if no patent had been granted, and which the Legislature can always secure for them, either temporarily or permanently, if and when it considers fit.

It follows from what I have said above that "adequate" cannot mean simply adequate to supply the demand in this

PARKER J. 1909 HATSCHEK'S PATENTS, *In re.* ZERENNER, *Ex parte.*

country, or be construed only with reference to the demand in this country for the patented article or the article produced by the patented process. The demand in this country may in some cases not only be a demand for the patented article, but a demand for the patented article as made by a particular firm or as made abroad. If, for example, the patent be for a new article and such article be manufactured both here and abroad, and part of the demand here be for the article made abroad, because it is got up more to the taste of a section of the public, I do not think that the manufacture here could on that account alone be held inadequate. To so hold would in effect be to force a patentee to use his patent rights to exclude altogether the import of foreign goods.

I agree that the demand and supply in this country are to be considered, though they are not the only facts to be considered upon the question of adequacy. If there were insufficient manufacture here to meet the demand for the home-made article, it might well be that the manufacture might be held to be inadequate; but even if there were no demand here at all the manufacture might be inadequate, for the rights of the patentee might have been so exercised as to preclude the growth of a demand by the imposition of unreasonable prices or unreasonable terms for licences, or simply because the patentee had wholly neglected this country in his efforts to develop a foreign trade. Every case must be considered on its own merits and with reference to its own attendant circumstances.

It was suggested that if a patentee could prove that an industry in a patented article or founded on the patented process could not be carried on profitably in this country, or as profitably as it could be carried on abroad, owing to difference in the cost of material or labour or other local conditions, he would have given a satisfactory reason within the meaning of the section. I do not think this suggestion is entirely correct. Certainly the fact that persons carrying on the industry in this country would make smaller profits than persons carrying it on abroad would, in my opinion, be no satisfactory reason at all. I can conceive cases in which a patentee, having obtained a patent, may find it impossible to work it in the United Kingdom because of the

nature of the invention, or because of local conditions which prevail here, but not in other countries, although these cases must, I think, be rare, and may be exceedingly difficult to prove. The extra cost of labour or material may well be counterbalanced by superior skill or in other ways. But it can never, in my opinion, be sufficient for a patentee defending himself under the section to prove that he cannot now start an industry with any chance of profit. The question really is, Could he have done so if he had used his monopoly fairly as between home and foreign trade, or if he had devoted the time and money which he has expended in developing a foreign industry to developing a home industry? It may well be that, having developed the industry abroad and given foreigners several years' start, he may find it difficult, if not impossible, to develop an industry on the same lines here; and yet such an industry might well have arisen but for the preference he has given to foreign countries.

It was also suggested that the section only contemplates revocation if revocation would lead to the establishment of a new industry or the further development of an existing industry in this country, so that, if the patentee had by an abuse of his monopoly succeeded in precluding the possibility of such establishment or development, his patent ought not to be revoked. I dissent entirely from this suggestion. I see no reason why the section should not have been intended to penalize a patentee who has abused his monopoly, and by a revocation of the patent this country becomes free, at any rate, from restraints on its trade which are opposed to the spirit of its common law.

I desire next to say a word or two upon the arguments addressed to me in support of the proposition that patentees who obtained their patents before the Act of 1907 are in a better position than patentees who obtain their patents after the passing of that Act. These arguments were all founded on the suggestion that patentees who obtained their patents before the Act had vested interests, and that in default of a provision for compensation I ought to construe the Act, as far as I reasonably can, so as to preserve these interests. Let us see whether there is really any substance in these arguments. The only express provision in favour of patentees who obtained their patents

PARKER J. 1909 HATSCHEK'S PATENTS, *In re.* ZERENNER, *Ex parte.*

before the Act consists in the one year limit, a sort of period of grace in which the patentee may, if he desires to save his patent, take means to secure that his patented article is manufactured or his patented process carried on in this country. In all other respects the Act puts all patentees in the same position whether they obtained their patent before or after the Act. It is, in my opinion, impossible to construe the provisions of the section in one way as to patents acquired before the Act and in another way as to patents acquired after the Act. All patentees are subjected to the same liabilities. The only possible distinction between patentees who obtained their patents before and patentees who obtained their patents after the Act is that the Comptroller or the Court might possibly accept as satisfactory, in the case of the former, reasons for not manufacturing the article or carrying on the process in this country which would be rejected as unsatisfactory in the case of the latter. I am of opinion that, to a limited extent, there may be reasons satisfactory in the one case which would not be satisfactory in the other, but I totally dissent from the contention that, if a patentee has before the Act precluded himself by contract from working his patent in this country, the existence of such contract is a satisfactory reason within the meaning of the section for not working it here. As I have said before, no such reason can be satisfactory which does not operate independently of any misuse which the patentee has made of his monopoly.

There is an historical reason for making no distinction in this respect in favour of existing patents. The mischiefs aimed at by the section arose, to a great extent at any rate, from the patentee exercising his exclusive right of sale without exercising his exclusive right of manufacture, contenting himself with permitting manufacture by others in this country and importing articles manufactured abroad. The Statute of Monopolies reserves only the right of the Crown to grant for fourteen years the sole right of working or making the invention and says nothing about the sole right of sale. The Crown has, however, always granted, by virtue of this reservation, the sole right of sale as well as the sole right of working and making. This has been held to be justified on the ground that the sole right of sale is an

ancillary right to the sole right of manufacture, and it might possibly at one time have been open to the Courts to refuse to protect the sole right of sale unless exercised as an aid to the sole right of manufacture in this country. The form of letters patent granted by the Crown has, however, invariably, so far as I can discover, contained a clause providing that if at any time during the term of the patent it should be made to appear to the King or any six or more members of his Privy Council that the grant was prejudicial or inconvenient to the King's subjects the letters patent should be void. There is an instance of this clause in a patent granted in 1618, several years before the Statute of Monopolies, and cited in the case of *Attorney-General* v. *Simpson* (1), and it appears from that case that the Privy Council entertained jurisdiction under the clause to regulate charges made by the patentee. (2) In my opinion letters patent have always been avoidable under this clause if worked to the prejudice or inconvenience of the King's subjects generally, and but for the fact that the jurisdiction of the Privy Council under the clause has fallen into disuse a patentee by abusing his monopoly would always have incurred the risk of losing his patent rights.

This, I think, affords a good reason for the fact that modern legislation designed to prevent the abuse of patent rights has never drawn any distinction between existing patents and patents to be granted in future. This was the case with regard to the compulsory licence clause of the Act of 1883, and with regard to the still more drastic provisions of the Act of 1902, which enabled the Privy Council to revoke a patent in every case in which the patent was worked, or the patented article manufactured, exclusively or mainly outside the United Kingdom, unless the patentee could shew that the reasonable requirements of the public had been satisfied, and which provided that such reasonable requirements should not be deemed to have been satisfied if, by reason of the default of the patentee to work his patent or manufacture his patented article in the United Kingdom to an adequate extent, or to grant licences on reasonable terms, any

(1) [1901] 2 Ch. 671, 675, 676.

(2) See the same case in the House of Lords, [1904] A. C. 476, 483.

PARKER J. 1909 HATSCHEK'S PATENTS, *In re.* ZERENNER, *Ex parte.*

existing industry or the establishment of any new industry was unfairly prejudiced or the demand for the patented article was not reasonably met. These provisions are nearly, if not quite, as drastic as the provisions of s. 27 of the Act of 1907, by which they have been superseded, and were expressly made applicable to existing patents. Unfortunately they were never put into operation, possibly because the procedure by way of petition to the Privy Council was too cumbrous a remedy. If they had been, I doubt whether the necessity for s. 27 of the present Act would have arisen. It would, in my opinion, clearly be wrong to treat a patentee as in a better position under s. 27 of the present Act than he would have been upon petition to the Privy Council under the Act of 1902, and upon such a petition his patent would have been revocable if by reason of his default in working his patent in this country, or in granting licences on reasonable terms, no industry in the patented article, or founded on the patented process, had arisen in this country, or such an industry had been unfairly hampered.

Lastly, I desire to make one or two observations on the Patent Rules (1) which govern the procedure before the Comptroller under s. 27 of the Act. As those rules at present stand, the applicant applies for revocation, merely stating in the application that the patented article is manufactured or the patented process is worked exclusively or mainly abroad, and need give no evidence in support of his statement, though the onus of satisfying the Comptroller of the truth of this statement rests, in the first instance at any rate, on him. The application is served on the patentee, who has thereupon within fourteen days to declare on oath whether the statement is or is not correct; and if he says the statement is incorrect, he must further declare on oath to what extent and in what place the patented article or process is manufactured or carried on within the United Kingdom, and, if such extent is inadequate, the reasons for the inadequacy. The applicant has a certain time to file, but need not file, statutory declarations in answer, and then the matter comes before the Comptroller, there being possibly up to this

(1) New procedure has since been provided: see *Solicitors' Journal*, May 8, 1909, and [1909] W. N., Pt. II., p. 198.

point no evidence that the case is within the section at all, for neither party is bound to give evidence of any manufacture abroad. The question whether the patent is or is not to be revoked is disposed of at the same hearing, and I am told that the patentee has to open his case and give his evidence before the applicant gives any evidence at all.

This procedure clearly, and in my opinion wrongly, puts the patentee on his defence before the Comptroller has been satisfied by the applicant that the state of affairs contemplated by sub-s. 1 has arisen. Such a procedure, besides being in my opinion most unfair to the patentee, is obviously open to very serious abuse. Even if the patented article or process is not manufactured or carried on abroad at all, yet, if any one makes an application under the section, the unfortunate patentee has to disclose, perhaps to some competitor or intending competitor, particulars of his business which he may not desire to disclose, and to give evidence in defence of his conduct before any case raising a presumption against him has been made out.

If the patent, for example, belonged to a firm like Messrs. Armstrong & Co., and were for an improvement in some small part of the mechanism of, say, a big gun, any one desiring to find out how many of such guns were manufactured in this country might make the necessary application for revocation, and, without tendering any evidence that the case was within the section, force the patentee to disclose on oath the extent to which the articles protected by the patent were manufactured in this country. Having obtained this information, he might elect to withdraw the application. Inasmuch as an application under the section can be made by any one, whatever may be his motive, and the section in effect penalizes patentees who have abused their monopoly, it is in my opinion all the more necessary, in order to prevent the section being improperly used, to insist that every applicant shall give at any rate prima facie evidence of the existence of the state of affairs contemplated by sub-s. 1 before a patentee is put to the trouble and expense of finding out and proving the extent to which the patented process or article is manufactured or carried on in this country or abroad, and of explaining and justifying everything he has done since the grant

PARKER J. 1909 HATSCHEK'S PATENTS, *In re.* ZERENNER, *Ex parte.*

of his patent. It must be remembered that not only can any person apply under the section, but he can apply from time to time as he pleases. Failure on one application would be no bar to another application a year later, and though the section was no doubt passed in the interest of the public, still, if it be worth while retaining any patent system at all, it ought, I think, to be construed to give reasonable protection to patentees, and for this purpose the applicant, who may be a mere common informer, ought to be required to prove what even a common informer has to prove, namely, some case requiring an answer.

In my opinion the proper course for the Comptroller to pursue when he receives an application under s. 27 is to inquire whether the patentee admits that the state of affairs contemplated by sub-s. 1 has arisen. If this is not admitted, he should inquire into the matter in the presence of both parties, and the applicant, being the person on whom the onus lies, should be the first to tender evidence. It may well be that the patentee knows neither what is being done abroad nor what is being done in this country in the way of manufacturing the patented article or carrying on the patented process. There is no particular reason why he should know what is being done abroad, unless, perhaps, he has foreign patents, or is himself manufacturing the article or carrying on the process abroad. Even as to the extent to which the article or process is being manufactured or carried on here he may have no information; for he may have sold licences outright, and not granted them with the reservation of royalties. I do not say that he may not in the course of the inquiry be compelled to say what he does know; but at least the applicant ought first to be called upon to make out some case requiring an answer, and, at any rate until he has given some evidence that the case is within the section, I do not see what answer is required. If, on the other hand, the patentee admits that the state of affairs contemplated in sub-s. 1 has arisen, or if after inquiry the Comptroller is satisfied that it has arisen, the patentee may fairly be called on to state first what his defence is, and then to prove it.

It would be convenient that in stating what his defence is the patentee should state the reasons which he intends to rely on if the extent to which the patented article or process is manufactured

or carried on is inadequate, and the particular facts on which he intends to rely if he contends that it is adequate.

As a general rule, I think that on appeal the patentee ought to be confined to his case as made before the Comptroller, and not allowed to set up a fresh case or adduce further evidence. In one of the cases I have heard I have allowed further evidence to be adduced, but only on the ground that until I have construed the Act patentees could hardly be expected to realize the nature of the burden thrown on them by the section and the nature of the evidence required to discharge it. But I do not think any such indulgence ought to be granted as a general rule.

I should like to point out that, even as the Patent Rules now stand, it appears to me that the Comptroller can call upon the applicant for evidence of the truth of the statement contained in the application, enlarging the time for the patentee to put in his evidence till this is done, and, if the applicant does not furnish evidence sufficient to call for an answer, may refuse to proceed further with the matter. Similarly he can, I think, enlarge the time for filing evidence which can only be relevant for the patentee's defence until he is satisfied that there is a case for calling on the patentee to defend himself, but, under the circumstances, it appears to me desirable that the rules should be altered. It must be remembered that the section is in its nature a penal section, that the patentee is on his trial, that mere accusation raises no presumption of guilt, and that the Comptroller is a Court exercising judicial functions. It is not merely the case of a departmental inquiry. The Comptroller is in the position of a judge, and not of a commissioner employed to take evidence and with power to summon before him and examine any person he pleases. The procedure therefore, I think, should be clearly specified in the rules, and should be a procedure adapted to the circumstances, having regard to the onus which the Act throws on the applicant and the patentee respectively.

I come now to the facts of this particular case. The patents in question were granted in 1900 for inventions relating to a process of manufacturing thin imitation stone slabs or tiles—I need not describe the process. The important point is that,

PARKER J. 1909 HATSCHEK'S PATENTS, *In re.* ZERENNER, *Ex parte.*

though in commercial operation in Germany, France, and Belgium, it has never been worked in this country. Clearly, therefore, the patentee is put on his defence, and the only question is whether he has given satisfactory reasons for this state of affairs. It appears that, having obtained the English patents and corresponding patents in the countries I have mentioned, he devoted himself to the establishment abroad of industries in which the patented process was carried on, using the monopoly conferred upon him by his patents in this country, not for the purpose of establishing a new industry here, but in order to secure to some foreign licensee the monopoly of selling in this country articles manufactured abroad. In my opinion a new industry might have arisen in this country but for the manner in which the patentee has exercised his patent rights, but it is quite enough to say that there is no satisfactory evidence that a new industry would not have arisen here if the patentee had exercised his patent rights fairly as between this country and foreign countries. Nothing has been proved, either as to the relative cost of material or wages or as to difference in local conditions, which points to the economic impossibility of such an industry having grown up in the United Kingdom if no preference had been conferred on foreigners. Possibly a manufacturer in this country might have had to be content with smaller profits than a manufacturer abroad, but even this is not proved. It was said that the demand here was too small to justify the expense entailed in laying down the necessary plant, but there is no evidence, or at any rate no satisfactory evidence, that this demand would not have been much greater than it is but for the manner in which the patentee has used his monopoly.

It is to my mind abundantly clear that, if these patents had been granted after the passing of the Act of 1907, they ought to have been revoked; and the only question is whether, having regard to the fact that they were granted in 1900 and to what occurred before the passing of the Act of 1907, indulgence ought to be granted to the patentee. It is to be observed that on January 26, 1906, the patentee granted what is in effect an exclusive licence for this country to a manufacturing company in Belgium. The licence provided that the Belgian company

might either import into this country goods made by them in Belgium or erect factories here, but the licensee precluded himself from granting licences here. The licensee has exercised the powers granted to him by the licence not to erect factories here, but to import his foreign-made goods into this country, excluding any competition between such goods and goods made in this country or elsewhere abroad. The state of things which has resulted would, I think, have rendered the patent revocable under the Act of 1902, for it does not seem to me that the patentee could have discharged the onus imposed on him by that Act any more than, in my opinion, he has discharged the onus imposed on him by s. 27 of the existing Act. There is no reason, therefore, why the patentee should be entitled to any indulgence, even if indulgence could be granted.

Stress was laid on the fact that the patentee, in conjunction with his licensee, has recently, in advertisements and circulars, expressed his willingness to sell or enter into working arrangements for the manufacture of goods in this country under the patented process. This was, however, done at the last moment, and I am not surprised that under the circumstances no one willing to buy or take a licence has been found. Even if it had been done forthwith after the Act, and the possibility of a sale being made or licences being granted had been made known much more thoroughly, I do not think the fact of no one being found willing to buy or take up a licence and manufacture here would have proved much. I do not know what the terms were upon which the patentee and licensee contemplated selling or granting licences, or whether the terms of the licences included protection against Belgian imports. If they did not, possible manufacturers might well be deterred by the fact that the Belgian firm had had so long a start, and an intending purchaser or licensee might well be deterred also by the uncertainty of the patent remaining under the circumstances unrevoked for a sufficient time to start a new industry.

Under all the circumstances I think that the revocation of the patent was amply justified, and, further, I am of opinion that the refusal of the Comptroller to suspend the revocation was also right. It would be wrong to suspend the revocation of a patent

PARKER J. 1909 HATSCHEK'S PATENTS, *In re.* ZERENNER, *Ex parte.*

merely on the chance of an industry springing up here under some licence which some one may possibly in future be willing to take. If the patentee himself and the Belgian licensees had been prepared themselves to start the industry here, and had utilized their year of grace in bona fide preparations with that end in view, but had found the year too short a period, the revocation might well have been suspended. But upon the evidence I do not believe that either the patentee or the Belgian firm has now or ever had any intention of manufacturing under the patented process in this country, or of allowing any one else to do so, unless he purchases or accepts a licence from them on terms which they may consider reasonable, but which possibly no prudent purchaser or licensee could accept, and as to the nature of which I am not informed.

I therefore affirm the Comptroller's decision and dismiss the appeal with costs, including the costs of the Attorney-General.

Solicitors for appellants: *Burn & Berridge.*

Solicitors for Zerenner: *Lloyd George, Roberts & Co.*

Solicitor for the Attorney-General: *Solicitor to the Board of Trade.*

F. E.

In re CALIFORNIA FIG SYRUP COMPANY'S APPLICATION FOR THE REGISTRATION OF A TRADE MARK.

WARRINGTON J.

1909

May 4, 5.

Trade Mark—Registration—Registrable Mark—"Distinctive" Mark—"Adapted to distinguish"—Geographical Name—Trade Marks Act, 1905 (5 *Edw.* 7, *c.* 15), *s.* 9, *sub-s.* 5.

Application under s. 9, sub-s. 5, of the Trade Marks Act, 1905, for the registration of the words "California Syrup of Figs" in respect of a medicinal preparation of syrup of figs. The applicant company was an American company carrying on business at San Francisco, in California, with agencies in England. The evidence shewed that the applicant company introduced its preparation into this country some twelve or thirteen years ago and had since then continuously sold it here under the name of "California Syrup of Figs," and it was admitted that at the present time the words "California Syrup of Figs" distinguished the syrup of figs prepared by the applicant company from the syrup of figs prepared by other persons:—

Held, that the words "California Syrup of Figs" were not "adapted to distinguish" the applicant company's goods from those of other persons and were not registrable as a trade mark under s. 9.

General observations as to the use of geographical names as trade marks.

In re National Starch Co.'s Application, [1908] 2 Ch. 698, and *In re Royal Worcester Corset Co.'s Application*, [1909] 1 Ch. 459, distinguished.

This was an application under s. 9, sub-s. 5, of the Trade Marks Act, 1905, for the registration of the words "California Syrup of Figs" as the trade mark of the California Fig Syrup Company in class 3 in respect of a "medicinal preparation of syrup of figs for human use."

The California Fig Syrup Company was an American company carrying on business at San Francisco, in California, with distributing agents in the United Kingdom and elsewhere.

The evidence shewed that about twelve or thirteen years ago the applicant company introduced its preparation into England and had since that time continuously sold it in this country under the name which it now proposed to register, namely, "California Syrup of Figs." That name was on the bottles in which the preparation was sold and was used in the advertisements which had been extensively issued by the applicant company, and in those advertisements the applicant company

WARRINGTON J.

1909

CALIFORNIA FIG SYRUP COMPANY'S APPLICATION, *In re.*

had taken the precaution of pointing out that the genuine California syrup of figs was that manufactured by it, and that of which it was the sole manufacturer.

The result of the evidence, which was undisputed, was that the words "California Syrup of Figs" did at the present time distinguish the syrup of figs prepared by the applicant company from preparations of a similar nature made and sold in England by other manufacturers.

The Board of Trade, under r. 39 of the Trade Marks Rules, 1906, referred the application to the Chancery Division, and it now came on for hearing on notice of motion that the application to the Board of Trade for the registration in class 3 of the words "California Syrup of Figs" in respect of a medicinal preparation of syrup of figs for human use might be heard and determined.

H. Terrell, K.C., and *Sebastian*, for the motion. The words "California Syrup of Figs" are a distinctive mark within the meaning of s. 9, sub-s. 5, of the Trade Marks Act, 1905. (1)

(1) The Trade Marks Act, 1905 (5 Edw. 7, c. 15), provides:

Sect. 9: "A registrable trade mark must contain or consist of at least one of the following essential particulars:—

"(1.) The name of a company, individual, or firm represented in a special or particular manner;

"(2.) The signature of the applicant for registration or some predecessor in his business;

"(3.) An invented word or invented words;

"(4.) A word or words having no direct reference to the character or quality of the goods, and not being according to its ordinary signification a geographical name or a surname;

"(5.) Any other distinctive mark, but a name, signature, or word or words, other than such as fall within the descriptions in the above paragraphs (1.), (2.), (3.) and (4.), shall not, except by order of the Board of Trade or the Court, be deemed a distinctive mark:

"Provided always that any special or distinctive word or words, letter, numeral, or combination of letters or numerals used as a trade mark by the applicant or his predecessors in business before the thirteenth day of August one thousand eight hundred and seventy-five, which has continued to be used (either in its original form or with additions or alterations not substantially affecting the identity of the same) down to the date of the application for registration, shall be registrable as a trade mark under this Act.

"For the purposes of this section

From 1897, when the applicant company brought an action against another company to restrain it from selling its preparation under the name of "American Syrup of Figs"—see *California Fig Syrup Co.* v. *Taylor's Drug Co., Ld.* (1)—the name "California" has continued to be distinctive of the applicant company's manufacture, as is proved by the evidence filed in support of the present application. The word, therefore, being distinctive, it is submitted that the Court will, notwithstanding the fact that it is a geographical word, allow its registration under s. 9, sub-s. 5. In *In re National Starch Co.'s Application* (2) the Court allowed the registration of the word "Oswego," which was the name of the place where the applicant company had its factory.

[WARRINGTON J. In that case "Oswego" had come to denote the preparation itself.]

It was there contended on behalf of the Registrar of Trade Marks that "Oswego corn flour" and not "Oswego" alone should be registered. Here we ask to be allowed to register not "California" alone, but "California Syrup of Figs."

[WARRINGTON J. I suppose the Court is not bound to make an order under s. 9, sub-s. 5.]

No; that was so held by Parker J. in *In re Royal Worcester Corset Co.'s Application*. (3) It is submitted that, the words "California Syrup of Figs" being distinctive of the applicant company's goods, the case comes within both the above decisions, and that the applicant company is entitled to the registration they ask for. It may be said that "California" is a geographical name, but s. 9 shews that the Legislature contemplated that a registrable mark might be a geographical name, and did not

'distinctive' shall mean adapted to distinguish the goods of the proprietor of the trade mark from those of other persons.

"In determining whether a trade mark is so adapted, the tribunal may, in the case of a trade mark in actual use, take into consideration the extent to which such user has rendered such trade mark in fact distinctive for the goods with respect to which it is registered or proposed to be registered."

(1) (1897) 14 Rep. Pat. Cas. 341, 564.

(2) [1908] 2 Ch. 698.

(3) [1909] 1 Ch. 459

WARRINGTON J.

1909

CALIFORNIA FIG SYRUP COMPANY'S APPLICATION, *In re*.

exclude geographical names from those which might be distinctive and therefore registrable.

[*Sargant.* The section was passed to meet cases like *In re Apollinaris Co.'s Trade Marks.* (1)]

There is a great distinction between the language of s. 9 of the Act of 1905 and that of the earlier Acts. Under s. 10 of the Trade Marks Registration Act, 1875 (38 & 39 Vict. c. 91), by which "trade mark" was defined, it was held that no new word mark could be registered. To remedy that objection it was provided by s. 64 of the Patents, Designs and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), that for the purposes of the Act a trade mark must consist of or contain at least one of the following essential particulars: "a distinctive device, mark, brand, heading, label, ticket, or fancy word or words not in common use." In *In re Van Duzer's Trade Mark* (2) it was held that the fanciful or abnormal use of a word not in itself obviously non-descriptive did not make it a "fancy word" within the meaning of that section. That section was repealed and a new provision substituted by s. 10 of the Patents, Designs and Trade Marks Act, 1888 (51 & 52 Vict. c. 50). The new s. 64 substituted for "fancy word or words" "(*d*) an invented word or invented words; or (*e*) a word or words having no reference to the character or quality of the goods, and not being a geographical name." Under that section the word "Somatose" was refused registration on the ground that it was not an invented word: *In re Farbenfabriken Application.* (3) In *Eastman Photographic Materials Co.* v. *Comptroller-General of Patents, Designs and Trade Marks* (4) the House of Lords pointed out that the wording of s. 64 of the Act of 1883 had been intentionally altered by s. 10 of the Act of 1888, and held that the word "Solio" was an invented word and capable of registration. The difference between the language of the Act of 1905 and that of the earlier Acts was introduced with the object of enabling the Court or the Board of Trade to have regard to the actual course of trade and to give effect to it. Although the name "California" designates the whole of a country where figs are grown, there may nevertheless be a

(1) [1891] 2 Ch. 186.
(2) (1887) 34 Ch. D. 623.
(3) [1894] 1 Ch. 645.
(4) [1898] A. C. 571.

property in the name when applied to the applicant company's preparation: *McAndrew* v. *Bassett* (1); and when it is proved that the name is de facto distinctive registration is ex debito justitiæ: per Lord Blackburn in *Orr-Ewing* v. *Registrar of Trade Marks.* (2) *Hart* v. *Colley* (3) shews the necessity of registration for the actual goods.

Sargant, for the Registrar of Trade Marks. The present application was referred to the Court by the Board of Trade in order that some general principles might be laid down as to where the line is to be drawn in the registration of geographical names as trade marks. There is no dispute that on the evidence the words "California Syrup of Figs" at the present time distinguish the applicant company's preparation from syrup of figs prepared by any other persons. The question, therefore, now raised must be considered solely upon general grounds.

Under the Act of 1888 all geographical names were expressly excluded from registration. By the Act of 1905 a middle course is now adopted. The registrar has no power to register geographical names, but the Court may in the exercise of its discretion determine whether a particular geographical name may be registered. A geographical name may be so general, e.g., "American" or "English," that it ought not to be allowed to be registered. Before allowing the registration of a geographical name the Court has to be satisfied that the name is "adapted to distinguish" the applicant's goods from those of other persons. A mark to be perfect should be as distinctive and as little descriptive as possible. To use the language of logic, it should be denotative and not connotative. Allsopp's mark of a hand is an example of a perfect mark. A word may be a perfect mark; e.g., "Lemco," the trade mark of the Liebig's Extract of Meat Company, which is distinctive and not in any way descriptive of the character or quality of the goods. So far as a name is geographical it is so much the worse, as it describes the place of manufacture of the goods. In the report of Lord Herschell's Committee on Word Marks under the Act of 1883, just prior to the Act of 1888 (quoted in Kerly on Trade Marks,

(1) (1864) 4 D. J. & S. 380. (2) (1879) 4 App. Cas. 479, 497.
(3) (1890) 44 Ch. D. 193.

WARRINGTON J.
1909
CALIFORNIA FIG SYRUP COMPANY'S APPLICATION, *In re.*

3rd ed. p. 143, and Sebastian on Trade Marks, 4th ed. p. 556), it is stated that "geographical words, which can be regarded as descriptive of the place of manufacture or sale of goods, are open to obvious objections." In *In re Magnolia Metal Co.'s Trade Marks* (1) Rigby L.J., in delivering the judgment of the Court of Appeal, discussed the meaning of the phrase "geographical name" and said that it must, in the absence of special circumstances, be interpreted so as to be in accordance in some degree with the general and popular meaning of the words, and that a word did not become a geographical name simply because some place upon the earth's surface had been called by it.

It has been contended that if a general geographical word like "American" has at the time of the application for registration come to denote the applicant's goods the Court is bound ex debito justitiæ to register it. The Act of 1905 no doubt to a certain extent permits the Court to take the business position into consideration. Under that Act the Court has to consider whether the geographical name is "adapted" to distinguish or "fitted" to distinguish the goods of the applicant from those of other persons. If it does in fact so distinguish them, that is a reason, but not a conclusive reason, for allowing its registration as a trade mark.

Take the word "California" in the present case. Its natural meaning is a large and important State of America, well adapted for growing fruit, including figs. "California Syrup of Figs" therefore is descriptive of any syrup of figs made either from figs grown in California or by a company carrying on business in California.

[WARRINGTON J. What do you say as to the *Oswego Case?* (2)]

That case was not argued upon general principles, as this case is now being argued. It did not touch the general question as to the right of a person to appropriate a general geographical designation. That is a matter which the Legislature has left to the Court, to which it has given a judicial discretion. There must be some limit imposed, otherwise an applicant might, for example, require to have the words "London boots" registered

(1) [1897] 2 Ch. 371, 393. (2) [1908] 2 Ch. 698.

as his trade mark because boots of his manufacture had come to be known by that description. Upon an application to register a geographical name as a trade mark what the Court has to consider is whether the mark is "adapted to distinguish" the goods of the applicant from those of other persons, or whether it is merely descriptive of the goods produced by any manufacturer under similar conditions. To allow the registration of the mark in the present case would be to give to the applicant company a monopoly of the right to describe its goods by a name which but for that monopoly would be open to other manufacturers to use for properly describing their goods.

H. Terrell, K.C., in reply. It is contended that a perfect trade mark is denotative and not connotative, but it is submitted that if the mark is adapted to distinguish and does in fact distinguish the goods of the applicant from those of other persons it is a perfect mark. The condemnation by Lord Herschell's Committee of the use of geographical names as trade marks was adopted in the Act of 1888, but was found not to work and has been abandoned in the Act of 1905. The question is what is the meaning of the word "adapted" in s. 9 of that Act, and it is submitted that it means "fitted," "suited," or "suitable" to distinguish. If in fact the mark does distinguish the goods, then it necessarily follows that it must be "adapted" to distinguish them. If, therefore, "California" does in fact distinguish the goods of the applicant company, then it is "adapted" to distinguish them, and that notwithstanding that other persons may come to California to manufacture syrup of figs. The Legislature has limited the duty of the Court to determining the question whether the proposed mark is adapted to distinguish.

[WARRINGTON J. If "adapted to distinguish" is equivalent to "does in fact distinguish," why did not the Act say so?]

What distinction is there in principle between "Yorkshire Relish" and "California Syrup of Figs"? The former has been registered as a trade mark.

[WARRINGTON J. It may be that "Yorkshire Relish" is adapted to describe the sauce apart from its user.]

It is simply piquant sauce made in Yorkshire. "California Syrup of Figs" has been identified with California. All the

WARRINGTON J. 1909 CALIFORNIA FIG SYRUP COMPANY'S APPLICATION, *In re.*

Court has to consider is whether the mark is adapted to one particular object, namely, to distinguish the goods of the user of it from those of other persons, and if in fact it does so, then it is "adapted" to distinguish. It is objected that if registration of this mark is granted it will prevent persons in California from describing their fig syrup as "California fig syrup." That difficulty, however, is met by s. 44 of the Act, which provides that no registration under the Act shall interfere with any bona fide use by a person of his own name or place of business.

WARRINGTON J. This case raises for the first time an important question of principle upon the construction and effect of s. 9 of the Trade Marks Act, 1905, as to the registration as trade marks of geographical names. [His Lordship shortly stated the nature of the application and the effect of the evidence, and continued :—] It is not disputed that the result of the evidence is that the words "California Syrup of Figs" do now distinguish the syrup of figs made by the applicant company from other preparations of a similar nature made and sold in this country. But there arises the further question whether, having regard to the fact that California is what one may call a wide geographical term, the name "California Syrup of Figs" can be said to be a distinctive mark, taking into consideration the definition of the word "distinctive" in s. 9 and the other provisions of that section.

Now, it may be perhaps desirable just to state very shortly what has been the history of the legislation with regard to geographical words. Under the original Act—the Trade Marks Registration Act, 1875—no word at all was capable of registration. The words of s. 10 of that Act which defined a trade mark were : "A trade mark consists of one or more of the following essential particulars ; that is to say, a name of an individual or firm printed, impressed, or woven in some particular and distinctive manner ; or, a written signature or copy of a written signature of an individual or firm ; or a distinctive device, mark, heading, label, or ticket." No word as such was capable of being registered. Then the Patents, Designs and Trade Marks Act, 1883, modified

that by allowing the registration of "a fancy word or words, not in common use" (s. 64, sub-s. 1 (*c*)). That was further modified by the Patents, Designs and Trade Marks Act, 1888, s. 10, which included amongst the essential particulars "a word or words having no reference to the character or quality of the goods, and not being a geographical name." Now it was found that in some cases there were words which might be said to have reference to the character or quality of the goods on the one hand, or which were geographical names on the other hand, but yet which, from their nature, or from the mode in which they had been used, were really descriptive of the goods of the persons who had used them in connection with their goods, and accordingly a modification of the strictness of the Act of 1888 was introduced into the Trade Marks Act, 1905. There is no dispute about that, and that the Act of 1905 was intended to enable certain words to be registered which, by the stringent interpretation of the Act of 1888, had been excluded from registration. How did the Act of 1905 do it? Sect. 9, which is really the only material section, provides that "A registrable trade mark"—defined by s. 3 to mean a trade mark which is capable of registration under the provisions of the Act—"must contain or consist of at least one of the following essential particulars." I propose to read them all, because one cannot understand the material provisions without seeing those which are not directly applicable. They are: "(1.) The name of a company, individual, or firm represented in a special or particular manner; (2.) The signature of the applicant for registration or some predecessor in his business; (3.) An invented word or invented words; (4.) A word or words having no direct reference to the character or quality of the goods, and not being according to its ordinary signification a geographical name or a surname." For all practical purposes so far as geographical names are concerned the provisions are the same as in the Act of 1888, with the exception that the words "according to its ordinary signification" are inserted before "a geographical name"; but then comes the modification, "(5.) Any other distinctive mark," with this qualification, "but a name, signature, or word or words, other than such as fall within the descriptions in the above paragraphs (1.), (2.),

WARRINGTON J.

1909

CALIFORNIA FIG SYRUP COMPANY'S APPLICATION, *In re.*

(3.) and (4.), shall not, except by order of the Board of Trade or the Court, be deemed a distinctive mark." To apply that to the present case, a geographical name or words having direct reference to the character or quality of the goods are not to be registered as distinctive marks unless the Board of Trade or the Court makes an order that the one in question is to be "deemed a distinctive mark." All the words with which I have to deal can only be registered, if at all, under sub-s. 5, "California" because it is a geographical name, "syrup of figs" because those words have direct reference to the character or quality of the goods in question. The proposed mark, therefore, cannot be registered unless the Court orders that it is to be "deemed a distinctive mark."

Then comes the question, what is meant by a distinctive mark, and the section has provided as follows: "For the purposes of this section 'distinctive' shall mean adapted to distinguish the goods of the proprietor of the trade mark from those of other persons." I pause there for one moment. If the section had stopped there, and the words "California Syrup of Figs" had been proposed for registration as a distinctive mark, would it have been possible for me to say that they were adapted to distinguish the goods of the applicants from those of other persons? Obviously not. I put out of consideration the words "syrup of figs" for the moment, because the argument has turned mainly on the word "California." How could the word "California" be adapted to distinguish syrup of figs made by the applicant company from syrup of figs made by other persons or companies? It could not possibly be so. "California" by itself, if one knew nothing more, would indicate, not that the goods were made by any particular person, but that they had their origin in that portion of the globe that is known by the name of California. But that is not the only thing. The Legislature has provided that in the case of an old mark—a mark in actual use, such as this—the Court is not merely to look at the nature of the word itself and see whether that is adapted to distinguish the goods of the proprietor of the trade mark from those of other persons, but is entitled to look at the actual circumstances attending the user. The provision for that is in

these terms: "In determining whether a trade mark is so adapted, the tribunal"—that is either the Board of Trade or the Court, as the case may be—"may, in the case of a trade mark in actual use, take into consideration the extent to which such user has rendered such trade mark in fact distinctive for the goods with respect to which it is registered or proposed to be registered." In other words, the Board of Trade or the judge is not merely to look at the word and say whether it is adapted to distinguish, and, if it is of a nature which is not adapted to distinguish, to refuse to make the order which is provided for by sub-s. 5, but is to take into consideration the extent to which the mark has in fact become by user distinctive. But the Legislature has not said that if it has in fact become distinctive, then it is in all cases to be regarded as adapted to distinguish. All it has said is that the judge is not to shut his eyes to the actual facts, but is to take them into consideration; and if, having done so, he thinks that, though the word is not prima facie adapted to distinguish, yet it is in fact adapted to distinguish, he may say so. Can I possibly say that of such a name as that which it is sought to register here? It is perfectly true that the mode and extent of user in this case have brought about the result which the applicant company desires, namely, that by constantly pointing out to the public in its advertisements that the syrup of figs which bears the name California is the syrup of figs made by the California Fig Syrup Company of San Francisco the public have taken it at its word, and California syrup of figs has become known to be the syrup of figs made by the advertising company. But the explanation of that may well be that the applicant company's syrup of figs has been the only syrup of figs during this time of which the source of origin has been California, and that therefore the use of the name "California" has only distinguished the goods of this particular manufacturer, because California syrup of figs coming from that particular district of the surface of the globe has always been the syrup of figs made by the applicant company.

It seems to me that the Act was not intended to give to a particular person, merely because he had been the only person using it during a number of years, a monopoly in a geographical

WARRINGTON J.

1909

CALIFORNIA FIG SYRUP COMPANY'S APPLICATION, *In re.*

name so wide and so common as that in this case. I desire to say that I am only deciding on the name which is before me. There might be many geographical names of places which one might take, for example the name of a river. Supposing the name of a river had been used in connection with syrup of figs, it might well be that on the facts the name might be adapted to distinguish this syrup of figs from other syrup of figs; but when you get a name such as this, the name of a large State, a State specially adapted to the production of the fruit from which this syrup of figs purports to be made, can the Court in such a case as that allow the registration of that name, which would exclude every person hereafter who desires to sell syrup made from Californian figs from truly describing it in that way, as made from figs grown in California?

In my opinion this is not a case in which, upon the construction of the Act, a judge ought to say that the name is "adapted to distinguish."

I have been referred to two cases in which the construction of this particular part of the Act has come before the Courts. One is my own decision in the *Oswego Case* (1), and the other is the *Royal Worcester Corset Case* (2), before Parker J. Neither of these cases is, in my opinion, an authority on the present case. In the case of my own, although "Oswego" was a geographical name, I think there was sufficient evidence to enable the Court to come to the conclusion that that name was adapted to distinguish the goods, in that case corn flour, from similar goods of other persons. In the *Royal Worcester Corset Case* (2) the decision of the learned judge was against the registration of the name; and, if I may judge from some expressions he let fall in the course of his judgment, I should conclude that, if he had had to decide the point, he would have had considerable difficulty in arriving at the conclusion that in that case the words "Royal Worcester" were adapted to distinguish the goods—I mean independently of the particular circumstances of the user which were proved in that case. It seems to me, however that may be, that neither of those cases is an authority on the present case,

(1) [1908] 2 Ch. 698. (2) [1909] 1 Ch. 459.

which raises the wide question of principle; and I think, for the reasons which I have endeavoured to express, the applicant company fails and the application must be refused with costs.

Solicitors: *McKenna & Co.; Solicitor to the Board of Trade.*

W. I. C.

In re NICHOLSON.
EADE *v.* NICHOLSON.

[1908 N. 77.]

Will — Construction — Tenant for Life and Remainderman — Unauthorized Securities — Wasting Securities — No Trust for Conversion — Power to Trustees to retain — Enjoyment of Income in Specie.

Where a will contains no trust for conversion and the tenant for life of the residue is given the entire income thereof, he is entitled to the income of the unauthorized securities retained by the trustees under a power of retainer whether the securities are of a permanent or of a wasting nature.

There is no distinction for the purposes of the application of the rule in *Howe* v. *Earl of Dartmouth*, (1802) 7 Ves. 137 a, between unauthorized securities of a wasting and those of a permanent nature.

Gray v. *Siggers*, (1880) 15 Ch. D. 74, followed.

Porter v. *Baddeley*, (1877) 5 Ch. D. 542, not followed.

ORIGINATING SUMMONS.

Robert Nicholson by his will, dated November 23, 1900, after appointing his wife, Emma Nicholson, John Kingswell Cole, and Thomas Benjamin Eade executors and trustees thereof, devised and bequeathed to them all his real and personal estate and property not thereby otherwise disposed of upon trust thereout to pay certain legacies to his wife and his daughter Vera Marguerite Nicholson respectively and to set aside a sum of 6000*l.* to be held upon trusts for the benefit of his daughter and her issue. The testator then bequeathed to his wife all his furniture, household stores, and effects, and proceeded as follows: "I direct that all the rest and residue of my real and personal estate and the property so given to my trustees as aforesaid upon trust (hereinafter called my residuary estate and property) shall be invested by my trustees and I desire them to pay over the

WARRINGTON J.
1909
NICHOLSON, *In re.* EADE *v.* NICHOLSON.

interest dividends and income thereof to my said wife during her life for her sole and separate use without power of anticipation and from and after my said wife's death I direct that the interest dividends and income of such residuary estate and property shall be paid to my said daughter Vera Marguerite Nicholson for her separate use without power of anticipation and at her death" he directed that such residuary estate and property should be distributed as therein mentioned. Towards the end of the will the testator proceeded: "I authorize and empower my trustees at their discretion to sell and convey all or any part of my said real estate and to collect and get in all or any part of my personal estate or to permit it to remain on investments the same as those in which it may be invested at the time of my death." The will contained no trust for conversion.

The testator died on February 9, 1902.

On November 24, 1902, Vera Marguerite Nicholson attained the age of twenty-one years.

On November 7, 1905, Emma Nicholson, the testator's widow, intermarried with Hugh Godfrey Nicholson.

At the death of the testator part of his residuary personal estate consisted of 1000 1*l.* shares in the London and Middlesex Freehold Estates Company, Limited, on which 15*s.* per share had been paid up. The business of this company mainly consisted in the development of a building estate and the realization thereof from time to time.

The dividends paid on these shares since the testator's death had been as follows: In 1902, 250*l.*; in 1903, 250*l.*; in 1904, 150*l.*; in 1905, 125*l.*; and in 1906, 100*l.*, or an average dividend during the five years of 17½ per cent. per annum.

Other parts of the testator's estate consisted of investments which were not trustees' securities, the income of which was considerably more than would have been obtained if such investments had been sold and the proceeds invested in trustees' securities.

The present summons was taken out by T. B. Eade, one of the trustees, for the determination (inter alia) of the questions (1.) whether upon the true construction of the will the income of the shares in the London and Middlesex Freehold Estates Company, Limited, ought to have been and (until realization) ought

in future to be wholly applied as income, or whether any and what part thereof ought to have been and ought to be set aside as capital, and (2.) whether any and what part of the income of the other investments forming part of the residuary estate and not being trustees' securities ought to have been and (until realization) ought in future to be retained as capital instead of being applied as income.

Cave, K.C., and *E. P. Hewitt*, for the summons.

Rowden, K.C., and *Tyldesley Jones*, for the widow, the first tenant for life. There being no trust for conversion in the will and the widow being given the whole of the income of the residuary personal estate, she is entitled to the income in specie of the securities retained by the trustees under their power of retainer: *In re Wilson.* (1) *In re Chaytor* (2) is distinguishable. In that case there was a trust for conversion with a power to postpone, but no express or implied gift of the income pending conversion. It has been suggested that the London and Middlesex Freehold Estates Company has been paying dividends out of capital, but there is no evidence in support of that allegation. The company is an assets realization company and has realized part of its assets in the ordinary course of its business. It is for the company to say whether the profits so derived are to be disposed of as dividends or converted into capital: *Bouch* v. *Sproule* (3); *In re Malam* (4); and the company is not bound to set aside a sinking fund to meet depreciation in value of wasting property: *Lee* v. *Neuchatel Asphalte Co.* (5)

[*Austen-Cartmell.* I do not dispute that on this will the income on the unauthorized securities other than wasting securities is given to the tenant for life in specie.]

[WARRINGTON J. You may take it that as regards the investments generally the widow is entitled to the income in specie: the only question is as to the income of the wasting securities, and on this I will hear Mr. Austen-Cartmell.]

Austen-Cartmell, for Vera Marguerite Nicholson, the tenant for

(1) [1907] 1 Ch. 394.
(2) [1905] 1 Ch. 233.
(3) (1887) 12 App. Cas. 385, 397.
(4) [1894] 3 Ch. 578, 585.
(5) (1889) 41 Ch. D. 1.

WARRINGTON J.
1909
NICHOLSON, *In re.* EADE *v.* NICHOLSON.

life in remainder. The mere absence from the will of a trust for conversion and the presence of a power to retain and a direction that the tenant for life is to take the income as it stands at the testator's death do not, in the case of wasting securities, prevent the application of the rule in *Howe* v. *Earl of Dartmouth.* (1) That rule, as stated in *Morgan* v. *Morgan* (2), is that "where property of a perishable nature is given to be enjoyed in succession, the object of the testator can only be effected by converting the property into permanent annuities, and giving, each person, in succession, the dividends of the fund." That rule applies exclusively to wasting securities. It has no application to unauthorized securities of a permanent nature the income of which may be enjoyed in succession. There is a direct conflict of authority on the point whether in a case like the present there is a distinction between unauthorized securities which are of a wasting and those which are of a permanent nature. In *Porter* v. *Baddeley* (3) it was held that there was that distinction, and in *Gray* v. *Siggers* (4) that there was not. It is submitted that the former decision should be followed in preference to the latter. The distinction between hazardous and wasting securities was pointed out by Kekewich J. in *In re Bates.* (5)

[WARRINGTON J. It appears from the report of that case that Kekewich J., if he had had to decide the point, would have followed *Gray* v. *Siggers.* (4) It is curious that in that case it does not appear to have been pointed out to him that *Gray* v. *Siggers* (4) was in direct conflict with *Porter* v. *Baddeley.* (3)]

The argument in *In re Bates* (5) was directed to the point whether the securities in question were hazardous or wasting. In *In re Sheldon* (6) and *In re Wilson* (7) the distinction now contended for was discussed, but the point was not decided. As a general proposition it is submitted that the widow is entitled to the income in specie of the permanent securities, but that as regards the wasting securities the rule in *Brown* v. *Gellatly* (8)

(1) 7 Ves. 137 a; 1 W. & Tud. 7th ed. p. 68.
(2) (1851) 14 Beav. 72, 82.
(3) 5 Ch. D. 542.
(4) 15 Ch. D. 74.
(5) [1907] 1 Ch. 22.
(6) (1888) 39 Ch. D. 50.
(7) [1907] 1 Ch. 394.
(8) (1867) L. R. 2 Ch. 751.

applies. Cases like *Bouch* v. *Sproule* (1) and *In re Malam* (2) have no application to a case like the present.

L. W. Byrne, for the remaining trustee.

WARRINGTON J. Two questions are raised by this summons—first, the general question whether the tenant for life under the testator's will is entitled to the actual income of the investments forming part of the estate of the testator at his death, and retained by the trustees, and, secondly, whether, assuming that the tenant for life is so entitled, that principle applies to shares which are said to be of a wasting nature as distinguished from merely unauthorized securities. I have inverted the order of the two questions because I wish to state the general question first and the particular question second.

The will of the testator is a very simple one. He appointed three trustees and gave them all his real and personal estate not otherwise disposed of. He then directed certain legacies to be paid thereout and a certain part thereof to be invested, and proceeded as follows: "I direct that all the rest and residue of my real and personal estate and the property so given to my trustees as aforesaid upon trust (hereinafter called my residuary estate and property) shall be invested by my trustees and I desire them to pay over the interest dividends and income thereof to my said wife during her life for her sole and separate use without power of anticipation," and after her death he declared certain other trusts, and then towards the end of his will he gave his trustees the following power: "I authorize and empower my trustees at their discretion to sell and convey all or any part of my said real estate and to collect and get in all or any part of my personal estate or to permit it to remain on investments the same as those in which it may be invested at the time of my death." At the time of his death his estate was invested in a number of securities which included many which were unauthorized as trustees' investments. Part of the estate was invested in shares of the London and Middlesex Freehold Estates Company, Limited, which has been described in one of the affidavits and in a letter of the secretary of the company as an assets realization company.

(1) 12 App. Cas. 385, 397. (2) [1894] 3 Ch. 578.

WARRINGTON J.
1909
NICHOLSON, *In re.*
EADE *v.* NICHOLSON,

The company has paid very large dividends, but I cannot say that, on the evidence before me, it is established that it has been paying dividends out of capital. On the contrary, the company has realized some of its assets in pursuance of the objects for which it was formed, and all that it has done has been to treat as profits available for dividend the difference between the price it has paid for the assets and the money which it has realized from their sale. It seems to me, therefore, that I am not in a position to say that the shares in the company are a wasting security, but it may be that they are so. For the purposes, therefore, of what I am about to say, I think it is better for me to assume that they are a wasting security.

It is admitted, on this will, that, so far as the unauthorized securities generally are concerned, the tenant for life is entitled to the actual income arising from them. The point now raised is very much the same as that which was decided by Swinfen Eady J. in *In re Wilson*. (1) In that case no question arose as to wasting securities; it was only unauthorized securities which were there in question. It was there suggested that there was a distinction between wasting and merely unauthorized securities, but that distinction was only alluded to and was not further discussed. It is undoubtedly true that in a number of cases it has been suggested that there is the distinction which has been contended for in this case between wasting and unauthorized securities, but only one case has been cited to me in which that distinction has been recognized and acted upon, namely, *Porter* v. *Baddeley*. (2)

The contention is that the true effect of what we lawyers call the rule in *Howe* v. *Earl of Dartmouth* (3) is that you must presume that, if a testator gives in general terms personal estate to be enjoyed by several persons in succession, he means what he says, and that, if part of the personal estate consists of items of property which are of a wearing out nature, the only way in which the testator's intention that they should enjoy the estate in succession can be carried out is by converting the whole estate or by treating it as converted into an authorized form of investment, and then paying the tenant for life the income of the

(1) [1907] 1 Ch. 394.
(2) 5 Ch. D. 542.
(3) 7 Ves. 137 a; 1 W. & Tud. 7th ed. p. 68.

authorized investments representing the estate when so converted. The rule only means that the Court will assume that by the gift of the personal estate to several persons in succession the testator intended that the whole of his estate should be converted, that being the only means by which in the case of wasting property the several persons would be enabled to enjoy it in succession: *In re Straubenzee* (1); *Cafe* v. *Bent* (2); *Pickup* v. *Atkinson* (3); *Macdonald* v. *Irvine* (4); *In re Bates.* (5) What the Court has to see is whether on the will with which it has to deal it is to say that the conversion to which I have alluded is to take place.

In the present case the will contains no trust for conversion. The estate itself is given to trustees upon trust to invest and pay the income of the investments to the tenant for life. The trust to invest there, having regard to what comes afterwards in the will, must mean to invest such moneys as the trustees might properly have in their hands arising either from the collecting or calling in of the personal estate, the falling in of portions of the estate, or the conversion of investments which under the power subsequently given they may convert. It cannot mean to convert the whole of the estate in whatever condition it might be at the testator's death. The powers given by the will are absolute discretionary and alternative powers to convert the estate or to permit it to remain in the same state of investment as at the testator's death. If therefore the testator has said that his trustees may retain any part of his estate in the same state of investment as at the time of his death, and if an investment at his death consisted of what is called a wasting security, how can I say that, as between tenant for life and remainderman, he intended that a particular investment should be converted into money? He has said that it may be retained, or, in other words, that in the case of wasting securities, if retained by his trustees in the proper exercise of their discretion, the persons entitled in remainder are to take their chance of the tenant for life dying during the continuance of the security.

(1) [1901] 2 Ch. 779, 782.
(2) (1845) 5 Hare, 24, 35.
(3) (1846) 4 Hare, 624, 628.
(4) (1878) 8 Ch. D. 101, 121, 124.
(5) [1907] 1 Ch. 22, 26.

WARRINGTON J.
1909
NICHOLSON, *In re.*
EADE *v.* NICHOLSON.

That expresses my view of the construction of this will, but I think I should not be at liberty to act upon that view if *Porter* v. *Baddeley* (1) had been the only case upon the point, because in that case, which was one of wasting securities—a case very similar to the present—Hall V.-C. did come to the conclusion that there was the distinction which has been contended for in this case and held that the trust to convert or retain did not authorize the trustees to pay the whole of the income of the wasting securities to the tenant for life. But though this was so, I do not think I am compelled to arrive at a view contrary to the view I entertain in this case, because there is at least one authority exactly the other way. There is one case in which the judge, although he did not find it necessary either to differ from or to follow *Porter* v. *Baddeley* (1), did express his opinion that that decision did not accord with his own view. So I am entitled to say that there is a conflict of authority on the point, and I am therefore free to follow my own opinion.

In *Gray* v. *Siggers* (2) the testator gave, not, as stated in the head-note to the report, several leasehold houses held upon short terms, but his real and personal estate, to trustees upon trust to pay the income to his wife for life, and then to his grandchildren, and he empowered his trustees to retain any portion of his property in the same state in which it should be at his decease, or to sell and convert the same as they should in their absolute discretion think fit. For all practical purposes that case was exactly the same as the one with which I have to deal. Part of the estate was invested on the wasting security of leaseholds for short terms. The question arose whether under that will the tenant for life was entitled to have the income of those leasehold houses, and Malins V.-C. came to the conclusion that she was. *Porter* v. *Baddeley* (1) was not cited in that case for some reason that I do not understand, for it was decided some three years before *Gray* v. *Siggers*. (2) Malins V.-C., after reading the discretionary clause in the will, says (3): "So that they"—that is, the trustees—"have the most complete power of selling if they think fit, and of retaining if they think fit: retaining for

(1) 5 Ch. D. 542. (2) 15 Ch. D. 74.
(3) 15 Ch. D. 77

the purpose of enabling the wife to have the same income and the same enjoyment from it that the testator himself had. Therefore the case is entirely taken out of *Howe* v. *Earl of Dartmouth* (1) and *Macdonald* v. *Irvine* (2), because of this power which gives the trustees the right to retain the property in specie. I cannot look at the question whether the leaseholds are for long or short terms, because, whether long or short, the widow was to have the property in specie if the trustees thought fit to retain it." Then he expressed his opinion as to what he considered the probabilities of the case—as to which I say nothing—and came to the conclusion that, having regard to the power to retain, the rule in *Howe* v. *Earl of Dartmouth* (1) did not apply, whether the unauthorized securities were permanent or wasting.

The same question came before Kekewich J. in *In re Bates*. (3) There again the will was for all practical purposes the same as in this case. The securities were shares in a coal company, and it was said that inasmuch as the colliery was leasehold they were wasting securities. The learned judge avoided deciding the broad question of whether they were so or not by holding that the shares in the coal company, although they were hazardous, were not wasting securities. But he did express his opinion (4) that, if the securities had been of a wasting nature, his view, if unfettered by authority, would have been the same as the view which I am taking in this case. He, however, regarded the matter as covered by *Porter* v. *Baddeley* (5) and thought that he ought not to differ from that decision, and founded his decision on the fact that in that case the investment was not a wasting security. It is very curious that, although in that case *Gray* v. *Siggers* (6) was cited to the learned judge, neither in the arguments nor in the judgment was attention drawn to the fact that it was in conflict with *Porter* v. *Baddeley*. (5) The learned judge appears to have considered that *Porter* v. *Baddeley* (5) was the only authority on the point.

(1) 7 Ves. 137 a; 1 W. & Tud. 7th ed. p. 68.
(2) 8 Ch. D. 101.
(3) [1907] 1 Ch. 22.
(4) [1907] 1 Ch. 28, 29.
(5) 5 Ch. D. 542.
(6) 15 Ch. D. 74.

WARRINGTON J.
1909
NICHOLSON, *In re.* EADE *v.* NICHOLSON.

Both *Porter* v. *Baddeley* (1) and *Gray* v. *Siggers* (2) were cited to North J. in *In re Sheldon* (3), but that learned judge again got out of the difficulty by holding that the securities in that case were not of a wasting nature. The same thing happened in *In re Wilson.* (4) There in the course of his argument in reply Mr. Sargant, who appeared for the tenants for life, referred to the fact that in *Porter* v. *Baddeley* (1) the securities were wasting securities, and Swinfen Eady J. went so far as to say, "They were part of the residue, and there was power to retain them. Why should there be any distinction between hazardous and wasting securities on this point?" But he did not find it necessary in that case to decide the point, because he held as a fact that the securities in question were merely unauthorized securities. Here I do find it necessary to decide the point, as otherwise I might have to put the parties to the trouble and expense of an inquiry whether or not the shares to which I have referred are wasting securities.

In my opinion, for the reasons I have stated, there is no distinction for the purposes of the application of the rule in *Howe* v. *Earl of Dartmouth* (5) between unauthorized securities of a wasting and those of a permanent nature. In the present case I have assumed that the shares in question are wasting securities, and I answer the questions in the summons by saying that the tenant for life is entitled to the whole of the income of the unconverted residuary estate whether the securities representing it are of a wasting or permanent nature.

Solicitors: *Wansey, Stammers & Co.; Robinson & Barrett.*

(1) 5 Ch. D. 542.
(2) 15 Ch. D. 74.
(3 39 Ch. D. 50.
(4) [1907] 1 Ch. 394, 397.
(5) 7 Ves. 137 a; 1 W. & Tud. 7th ed. p. 68.

W. I. C.

OCHS *v.* OCHS BROTHERS.

WARRINGTON J.

1909

May 21.

[1908 O. 1317.]

Arbitration—Practice—Agreement to refer—Legal Proceedings—Application for Stay—Step in Proceedings—Summons for Directions—Treatment of Summons as Summons for Account under Order XV. *—Acquiescence by Defendants without Protest—Undertaking by Defendants to furnish Account —Arbitration Act*, 1889 (52 & 53 *Vict.* c. 49), *s.* 4.

Attendance by defendants before a Master on the usual summons for directions taken out by the plaintiff, which the Master proposed to treat as a summons for an account under Order XV., and giving an undertaking to furnish an account as a term of the summons standing over, is taking a step in the proceedings within the meaning of s. 4 of the Arbitration Act, 1889, and the defendants are thereby precluded from obtaining a stay of proceedings under that section.

It is not necessary in such a case that an order should actually have been made.

County Theatres and Hotels, Ld. v. *Knowles*, [1902] 1 K. B. 480, followed.

Adjourned Summons.

By an agreement dated July 17, 1902, and made between James Frank Ochs of the one part, and Albert Lionel Ochs, George Ochs, and Thomas Fell Daglish (thereinafter referred to as the continuing partners) of the other part, it was provided (clause 1) that the partnership between the parties thereto thitherto carried on in London under the style or firm of Ochs Brothers and in Paris under the style or firm of Ochs Frères should from and after the date of the agreement be dissolved so far as respected J. F. Ochs, but should be continued by the continuing partners. By clause 2 J. F. Ochs was to be paid one fifth of the net amount which had since December 31, 1901, been received by the partnership or which should thereafter be received by the continuing partners in respect of the debts specified in a list of debtors which had been signed by him and by or on behalf of the continuing partners, and he was also to be paid one fifth part of the net proceeds which had since December 31, 1901, been received by the partnership or which should thereafter be received by the continuing partners in

WARRINGTON J.
1909
OCHS v. OCHS BROTHERS.

respect of the precious stones specified in a list which had been signed by him and by or on behalf of the continuing partners. The continuing partners were on October 1, January 1, April 1, and July 1 in each year to render J. F. Ochs a statement of the amounts so received in respect of such debts and in respect of the proceeds of stones realized, such statement to be certified as correct by Messrs. Cooper Brothers & Co., and were on rendering such account to pay J. F. Ochs such one fifth as aforesaid, the first of such payments to be made on October 1 then next, and that payment to include receipts subsequent to December 31, 1901, and each subsequent payment to include receipts during the then previous three calendar months. Clause 11 was as follows: "If any doubt, question, or difference shall at any time arise between the parties hereto or between any of them and the executors or administrators of either of them touching any clause or thing herein contained or any account to be made or rendered as hereinbefore is mentioned or any other thing whatsoever in any way relating to or concerning this agreement or in connection therewith the matter in difference shall with all usual powers as to costs and otherwise be referred to Ernest Cooper of the city of London chartered accountant as sole arbitrator or failing him to a then member of the firm of Cooper Brothers & Co. chartered accountants and the provisions of the Arbitration Act, 1889, shall apply to such arbitration."

On October 9, 1908, the plaintiff issued his writ in the present action for an account of the debts received, the stones realized, and the shares and other property sold by the defendants subject to the above agreement, and for payment of such sum as might be found due on taking such account.

On October 26, 1908, the plaintiff issued his summons for directions, which was returnable on October 31, and on that day the matter was discussed before the Master and adjourned to November 3.

On November 3 the matter again came before the Master, when the plaintiff's solicitors read an affidavit of the plaintiff, in which he stated that he required an account, and the summons was then adjourned to November 6 to enable the defendants to consider the evidence.

On November 5 an affidavit of George Ochs was filed on behalf of the defendants, in which he alleged that all moneys payable or to become payable to the plaintiff under the agreement of July 17, 1902, were by an indenture of mortgage dated August 29, 1903, assigned by the plaintiff to the Commercial Union Assurance Company, Limited, and that that company and not the plaintiff were consequently now entitled to receive any sums payable by the defendants under the terms of the said agreement, and that the defendants were prepared to deliver accounts in accordance with the provisions of the agreement. He then referred to the terms of the arbitration clause in the agreement and stated that "The defendants consequently require that in the event of any question arising regarding the accounts or the rights of the plaintiff under the said agreement such question shall be referred in pursuance of the arbitration clause in the said agreement," and in the last paragraph of his affidavit he alleged that "The plaintiff is indebted to the defendants in a large amount for money lent by them to him and interest thereon and the defendants will seek to counterclaim in this action for the amount due to them from the plaintiff in respect of the said advances."

On November 6 the matter came again before the Master, when it was further discussed, and upon the defendants undertaking to deliver an account to the plaintiff within seven days the summons was adjourned generally.

On November 9 an account was delivered by the defendants' solicitors to the plaintiff's solicitors. That account not being considered satisfactory by the plaintiff, the summons was restored, and on December 1 it came again before the Master, but was adjourned till December 4 to enable the defendants to consider their position.

On December 4 the defendants' solicitors stated to the Master that they were about to issue a summons to stay under the Arbitration Act, 1889, whereupon he adjourned the summons under consideration generally pending the result of such summons.

On December 5 the present summons to stay was issued by the defendants, asking that all further proceedings in the action

WARRINGTON J.

1909

OCHS v. OCHS BROTHERS.

might be stayed until further order pursuant to s. 4 of the Arbitration Act, 1889.

The summons to stay came before the Master on December 23, when he declined to make any order, stating that, the defendants having attended the summons for directions without objection and having treated it as asking for an account under Order xv., and having filed evidence in answer to that of the plaintiff for an account under Order xv., they were not, in his opinion, in a position to ask for a stay under s. 4 of the Arbitration Act, 1889.

The summons was adjourned into Court.

On January 30, 1909, the writ was amended by adding the Commercial Union Assurance Company, Limited, as co-defendants.

Fairfax Luxmoore, for the summons. There are three points on which the plaintiff will rely as disentitling the defendants to the stay they ask, namely, (1.) appearing on the summons for directions, (2.) undertaking to furnish an account, and (3.) filing an affidavit in answer to the plaintiff's affidavit on the summons for directions.

In *Ives & Barker* v. *Willans* (1) Lindley L.J. deals with the construction of s. 4 of the Arbitration Act, 1889, and points out that what the section contemplates is the taking of some step "such as taking out a summons or something of that kind, which is, in the technical sense, a step in the proceedings." Here the defendants have not taken any step at all, for no order has been made on the summons for directions. That circumstance distinguishes the present case from *County Theatres and Hotels, Ld.* v. *Knowles* (2) and *Richardson* v. *Le Maitre*. (3) In both of those cases an order had been made with the acquiescence of the applicants for the stay. Here no order has been made by the Master that the summons for directions should be treated as a summons for an account under Order xv. It was merely a suggestion on his part. It is true that the defendants gave an undertaking to deliver an account, but no order was made requiring them to do so. Further, the defendants at the earliest

(1) [1894] 2 Ch. 478, 483, 484. (2) [1902] 1 K. B. 480.
(3) [1903] 2 Ch. 222.

possible moment claimed to take advantage of the arbitration clause. In *Zalinoff* v. *Hammond* (1) it was held that the mere filing of affidavits in answer to a motion for a receiver in an action for dissolution of partnership was not a "step in the proceedings." The filing, therefore, in the present case of an affidavit in answer on the summons for directions cannot be in a different position. [He also referred to *Brighton Marine Palace and Pier, Ld.* v. *Woodhouse.* (2)]

Cave, K.C., and *Bryan Farrer*, for the plaintiff, were not called upon.

WARRINGTON J. This is an application by the defendants, Ochs Brothers, for a stay of proceedings in order that the question at issue between the parties may be submitted to arbitration pursuant to a clause for submission contained in an agreement. The action is brought for an account and payment of what shall be found due thereon, and is founded upon an agreement dated July 17, 1902, for the dissolution of the partnership between the plaintiff and the defendants. That agreement contains a full arbitration clause, sufficient to cover all matters in dispute in the action, and therefore prima facie the defendants would be entitled to have that clause enforced and to have the proceedings in the action stayed; but s. 4 of the Arbitration Act, 1889, gives the defendants the right to apply to the Court for a stay of proceedings only after appearance and before delivering any pleadings or "taking any other step in the proceedings." The question is, therefore, whether the defendants have "taken a step" in the proceedings.

The facts are as follows. On October 26, 1908, the plaintiff took out a summons for directions (the writ in the action having been issued on October 9, 1908), that summons being, in accordance with the usual practice, issued in blank form so that it could be filled up according as either party might wish any particular direction to be given or any particular question to be dealt with.

On October 31 the summons came before the Master. The defendants appeared, and the summons was adjourned to

(1) [1898] 2 Ch. 92. (2) [1893] 2 Ch. 486.

WARRINGTON J.
1909
OCHS v. OCHS BROTHERS.

November 3 with the object, as the Master said, of enabling the defendants to file an affidavit shewing what their defence to the action was, or whether they had any defence. On November 3 the plaintiff filed an affidavit in which he stated that he required an account, and the Master, having the matter then before him, proposed to treat the summons for directions as a summons for an account under Order xv. The defendants appeared and made no objection, and the summons was adjourned to November 6. On November 5 the defendants filed an affidavit in answer to the plaintiff's affidavit. In that affidavit they alleged a matter of defence and purported to explain the reason why they had not rendered an account—which they stated that they were prepared to deliver—and they also referred to the arbitration clause in the agreement and said that, in the event of any question arising as to the account or the plaintiff's rights, they would rely upon the arbitration clause; but they did not otherwise protest against any further proceedings being taken in the action. They only said that in certain events the arbitration clause would be insisted upon; in other words, they made a conditional statement that the arbitration clause would be insisted on. On November 6 the matter came again before the Master, when the summons for directions must be taken as having been a summons for an account under Order xv., and on that occasion the defendants gave an undertaking to deliver the account asked for within seven days, and upon their giving that undertaking the Master directed that the summons should stand over. In pursuance of their undertaking the defendants did deliver an account, but it was not considered satisfactory by the plaintiff, and the summons was accordingly restored. On December 1 the summons was adjourned to December 4 to enable the defendants to determine whether they would counterclaim, and on December 4 the defendants for the first time stated that they intended to apply to the Court to stay proceedings in the action under s. 4 of the Arbitration Act, 1889. Accordingly the Master, as he was bound to do, adjourned the summons generally.

The question now to be decided, therefore, is, Have the

defendants "taken any step" in the action within the meaning of s. 4 so as to preclude them from claiming the right to have the action stayed? There are only two cases to which I think it is necessary for me to refer. They are *County Theatres and Hotels, Ld.* v. *Knowles* (1) and *Richardson* v. *Le Maitre.* (2) In *County Theatres and Hotels, Ld.* v. *Knowles* (1) what happened was this: An action having been brought for breach of a written contract which contained an agreement to refer matters in dispute between the parties, the defendant attended at chambers on the hearing of a summons for directions taken out by the plaintiffs, and on that summons an order was made which is known as a cross order for discovery, that is, an order that the plaintiffs should give discovery to the defendant, and that the defendant should give discovery to the plaintiffs. Collins M.R. pointed out that upon a summons for directions under Order xxx. either party might apply for relief just as if he had issued a separate summons, and so the order for discovery must be treated as made at the request of the defendant as well as of the plaintiff, and therefore the defendant must be regarded as having taken a step in the action. In *Richardson* v. *Le Maitre* (2) matters did not go so far as in *County Theatres and Hotels, Ld.* v. *Knowles.* (1) The defendant there had attended before the Master on a summons for directions taken out by the plaintiff and had only acquiesced without protest in a common form order for delivery of pleadings. Swinfen Eady J. held that attending the summons for directions without protest was sufficient, and that the defendant had "taken a step in the proceedings" within the meaning of s. 4 of the Arbitration Act, 1889, and wound up his judgment with a statement which I think it desirable I should read. It is this: "In my opinion, the details of the order made on a summons for directions do not make any difference. I should be frittering away the decision of the Court of Appeal if I held that it applied only to orders exactly similar to the one before them. Their decision is based on wider grounds. Attending this general summons for directions without objection, and without asking for an adjournment, in

(1) [1902] 1 K. B. 480. (2) [1903] 2 Ch. 222, 225.

WARRINGTON J.
1909
OCHS v. OCHS BROTHERS.

order to make an application to stay the action, is taking a step in the proceedings within the meaning of s. 4 of the Arbitration Act, 1889." Thus Swinfen Eady J. states in general terms that attending a summons for directions and making no protest is taking a "step." In the present case it is not necessary for me to go so far as that: it is sufficient for me to say that I think, in accordance with *County Theatres and Hotels, Ld.* v. *Knowles* (1), there was in this case a "step" taken by the defendants. It is not necessary, in my judgment, for an order to have been actually made. There was a direction on November 6 that the summons should stand over upon the undertaking of the defendants to deliver an account, and I think that the giving of that undertaking was sufficient to constitute the taking of a "step" within the meaning of s. 4 of the Act of 1889. In my opinion, therefore, it is now too late for the defendants to apply to the Court to stay the proceedings in the action, and I must accordingly dismiss the application with costs.

Solicitors for defendants: *Hollams, Sons, Coward & Hawksley.*
Solicitors for plaintiff: *Kekewich, Smith & Kaye.*

(1) [1902] 1 K. B. 480.

W. I. C.

BANK OF AFRICA, LIMITED *v.* COHEN.

C. A.
1909
EVE J.
Jan. 29;
Feb. 1, 2, 3, 4.
C. A.
May 5, 6, 7, 28.

[1908 B. 202.]

Conflict of Laws—Immovables—Contract relating to Foreign Land—Capacity to Contract—Lex Situs.

The capacity of a person to enter into a contract relating to immovables is governed by the lex situs.

Therefore, where a married woman, whose domicil was English, by a deed executed in England, agreed to mortgage to a bank carrying on business in England and in the Transvaal certain land belonging to her at Johannesburg, the title deeds of which were in the possession of the bank for safe custody, as security for past and future advances by the bank to her husband, but without incurring personal liability for the same, and appointed the bank manager at Johannesburg her attorney to mortgage and transfer this land, and to execute all necessary instruments for that purpose, and to appear before the Registrar of Deeds at Johannesburg and take all necessary steps for registering the same, and authorized her attorney to declare in her name that she renounced in favour of the bank the benefit of all rights which the law of the Transvaal granted her in relation to the land in question, and by virtue of two provisions of the Roman-Dutch law, which prevailed in the Transvaal, a married woman (subject to certain immaterial exceptions) was incapable of becoming surety for her husband unless she expressly renounced the benefit of each of these laws after having been informed of her rights thereunder:—

Held, that the question of her capacity to enter into this agreement was governed by the law of the Transvaal, consequently that the agreement was void for want of capacity, and that the bank were not entitled to retain the title deeds.

WITNESS ACTION.

The plaintiffs carried on business as bankers in London and in the Transvaal. The defendant was the wife of L. W. Cohen, the matrimonial domicil being English. In November, 1903, Mr. Cohen was heavily indebted to the plaintiffs and was desirous of obtaining further advances from them, and the defendant was the registered owner of two plots of land near Johannesburg, the title deeds of which were held by the plaintiffs for safe custody on her behalf.

By a power of attorney dated November 23, 1903, and executed by the defendant and her husband in London, after reciting that the plaintiffs had made advances to the defendant's

C. A. 1909 BANK OF AFRICA, LIMITED v. COHEN.

husband and might from time to time make further advances to him, and that the defendant was desirous of securing the repayment of such sums as might from time to time be due to the plaintiffs by reason of the said advances and of giving to the plaintiffs for such purpose two mortgage bonds to be charged upon the two plots of land in question, the defendant, with the assistance and authority of her husband, as testified by his execution of the deed, appointed Alexander Wight, the manager of the bank at Johannesburg, or other the manager for the time being there, to be her attorney to represent her before any registrar of deeds or other proper authority in the Transvaal and acknowledge her indebtedness in such sums as he might fix and determine, and also for her to settle the terms and conditions as to the rate of interest, not exceeding 7 per cent. per annum, time of repayment, and all other details of the said bonds so to be granted by her as aforesaid, and also for her and in her name to pass, sign, execute, and acknowledge the same and any other fitting act, deed, or instrument that might be necessary to constitute valid securities in favour of the plaintiffs for the repayment of all such sums of money as aforesaid, and for her and in her name to make all fitting and customary declarations and to take all necessary steps for the due registration of the said bonds in the proper office, and generally to do, execute, and perform all such further acts, deeds, matters, and things as might be necessary for completing the securities aforesaid as fully and effectually as she could herself do if personally present.

The plaintiffs thereupon transferred the documents to an account for deposit by way of security for such advances, and they made further advances to Mr. Cohen. In February, 1906, the plaintiffs sent the documents of title with the power of attorney to South Africa with instructions not to complete the security without further orders.

Doubts having arisen whether the Registrar of Deeds would act upon this power of attorney, a second power of attorney, dated December 4, 1906, was executed in London by the defendant and her husband, whereby, after reciting that the plaintiffs had made advances to the defendant's husband and might from time

to time make further advances, and that with the concurrence of her said husband the defendant agreed with the plaintiffs to mortgage or transfer to them certain property thereinafter described, being the two plots of land in question, as security for the said advances made or to be made, but without incurring personal liability for the said advances, the defendant with the assistance and authority of her husband, as testified by his execution of the deed, appointed Alexander Wight or other the manager for the time being of the bank at Johannesburg to be her attorney for her and in her name and on her behalf to make over, assign, charge, mortgage, convey, or transfer to the plaintiffs for such price, for such terms, rate of interest, and upon such conditions in all respects as the said attorney should think fit the property in question, and for such purposes to pass any bonds or sign, seal, deliver, or otherwise execute all fit and necessary instruments and deeds of transfer, assignment, conveyance, or mortgage, and for her to appear before any registrar of deeds in Johannesburg or elsewhere in South Africa, and then and there to make all fit and necessary declarations of value, acknowledgments of indebtedness, and of her execution of any conveyance, bond, deed, or document to be executed pursuant to the deed now in statement, and to take all necessary steps for the purpose of recording and registering the same in the proper books and office for the record and registration thereof, and she further expressly authorized and empowered her said attorney in or in relation to any conveyance, deed, or document to be executed pursuant to the deed now in statement to declare in her name, as she thereby declared, that she renounced in favour of the plaintiffs and for ever relinquished and abandoned the benefit of all rights whatsoever which the laws of the Transvaal Colony granted her in relation to the property aforesaid, and generally for her and in her name to do, execute, and perform all such further and other acts, deeds, matters, and things as should be fit, requisite, and necessary in the premises as fully and effectually to all intents and purposes as she herself could do if present.

On November 2, 1907, the plaintiffs obtained judgment against Cohen for 6538*l.* 19*s.* 1*d.*, being the sum then due to them in

C. A. 1909

BANK OF AFRICA, LIMITED v. COHEN.

respect of advances. The plaintiffs were unable to obtain registration in South Africa of the two plots of land in question by reason of the fact that neither of the above deeds sufficiently complied with the law of the Transvaal relating to married women, and the property still remained registered in the name of the defendant. The defendant subsequently repudiated her obligations under these deeds and demanded a return of the documents of title relating to the said property from the plaintiffs' manager at Johannesburg, and she threatened to take legal proceedings against the plaintiffs for their detention.

The plaintiffs then brought this action for (1.) specific performance of the agreement contained in the deed of December 4, 1906, for the transfer to the plaintiffs of the said property; (2.) an injunction restraining the defendant from taking proceedings in the Transvaal to recover possession of the documents of title; (3.) an injunction restraining the defendant from charging or disposing of the property otherwise than to the plaintiffs; (4.) alternatively damages. By her defence the defendant alleged that at the time when she executed the second power of attorney she did not understand its effect, and that under the law of the Transvaal, by which the question of her capacity to transfer the property was governed, the alleged agreement was wholly void, and she counterclaimed for a declaration that both the powers of attorney were void as against her and delivery up of the same for cancellation, delivery up of the documents of title, and damages for the wrongful detention thereof.

At the trial expert evidence was adduced on both sides as to the law of the Transvaal. This evidence was to the effect that under two provisions of the Roman-Dutch law (which was the law prevailing in the various South African colonies), namely, the Senatus Consultum Velleianum and the Authentica "si qua mulier" (1), a married woman was incapable of becoming surety for her husband unless she obtained some pecuniary benefit from

(1) The Authenticum, otherwise "novellarum Iustiniani versio vulgata," is the Latin text in which alone the Novels, whether originally Latin or Greek, were known to mediæval civilians. This "authentica" corresponds to Nov. 134, c. 8. See L. Q. R. iv. 360; Holtzendorff's Encykl. d. Rechtswissenschaft, ed. Kohler, i. 158, 169; Codex ed. Krüger, 1877, p. 511.—F. P.

the contract of suretyship, or unless she was engaged in trade and the contract of suretyship had reference thereto, or unless she clearly and specifically renounced the benefit of each of these two laws after being fully informed of her rights thereunder, and that a general renunciation was not sufficient. Upon the question whether or not it was essential that the renunciation should take place before the contract of suretyship was entered into the evidence was not conclusive.

The action came on for hearing before Eve J. on January 29, 1909.

Stewart-Smith, K.C., *Shearman*, K.C., and *George Wallace*, for the plaintiffs.

P. O. Lawrence, K.C., and *G. F. Hart*, for the defendant.

Eve J., after stating the facts and holding that the defendant knew what she was doing when she entered into the transaction and executed the deeds in question, continued:—The matter, so far as the law stands, arises in this way. The subject-matter which Mrs. Cohen intended to charge to the bank is land situate in Johannesburg, and the contract which she has entered into, an executory contract charging that land, must, it is suggested on her behalf, be construed in any event according to Transvaal law. It relates to an immovable, that is to say, land in the Transvaal, and, further, having regard to the particular intention of this contract, it is obviously a contract which in a large part had to be carried out and given effect to in the Transvaal; and, further than that, it is said (and this really goes to the root of the matter) that before the Court can hold Mrs. Cohen bound by this contract the Court is bound to inquire whether at the moment when she purported to enter into this contract she had the legal capacity, according to the law of the Transvaal, to enter into such a contract. With regard to the law of the Transvaal, I have had very great assistance from the four experts who have been called, two on each side, and when one comes to examine their evidence, as I have done, with the authorities to which they have been good enough to refer me, the position seems to be this: Under the Roman-Dutch law, which governs the position of this married

C. A. 1909

BANK OF AFRICA, LIMITED v. COHEN.

Eve J.

woman so far as regards her real property in the Transvaal, a married woman was originally prohibited entirely from entering into any contract of suretyship for her husband; the disqualification was absolute, but by degrees, no doubt, as civilization advanced, and as the married woman was more and more supposed to be emancipated from the control of her husband, certain exceptions were engrafted or grew on that absolute prohibition—exceptions which went to this, that if the married woman herself obtained a pecuniary benefit from the contract, it was not regarded merely as a contract of suretyship, but was regarded more as a contract for her own benefit, and a contract which she was therefore capable of entering into. Further, it was felt that a woman who embarked in trade, and who must be presumed to have a knowledge of business calculated to protect her from undue influence or being led into adopting liabilities which she would not otherwise be led into adopting, might also be treated as a woman standing in an exceptional position, and there were other cases; but the married woman who did not fall under those express exceptions was still prohibited from entering into a contract of suretyship unless certain necessary formalities were complied with. Those formalities amount to this, that she must have explained to her explicitly and specifically the true nature of the rights which she enjoyed under the law, and, having had them so explained to her explicitly and specifically, she must formally renounce those benefits, or the benefit of those privileges, and unless and until a married woman who did not fall within any of the exceptions had gone through those formalities she was, and she is, under the Roman-Dutch law, incapacitated and incapable of entering into a contract of suretyship for her husband. That I think is the result of the expert evidence with regard to the South African law. The evidence seems to me to shew that the law is as stated by Lord Watson in *Mackellar* v. *Bond*. (1) He says: "By the law which prevails in Natal a lady cannot be effectually bound as a surety, even where she executes the deed by her own hand, unless she specially renounces the benefits of the Senatus Consultum Velleianum, and also the benefits of another rule,

(1) (1884) 9 App. Cas. 715, 717.

de [*sic*] authentica. The effect of these privileges is to render her deed altogether void, unless she has expressly renounced her right to plead them."

Now in this case Mr. Lawrence, on behalf of the defendant, says this is a question which goes to the capacity of one of the contracting parties. The Court in dealing with a contract relating to immovables is bound to determine this question of capacity by the lex situs, and if the lex situs shews that the contracting party had not the capacity to contract, the whole contract is void, and nothing can be done in this country to enforce that contract against the contracting party. I may say this in order that it may not be thought that I have overlooked it, that if I were here construing this contract according to the law of England, having come, as I have come, to the conclusion of fact that Mrs. Cohen understood the nature of the transaction into which she was entering, I should not be prepared to hold that the mere fact that the transaction resulted in a benefit to her husband, and that she had no advice independent of her husband, operated to raise a presumption that the contract was void. It seems to me that the mere relationship of husband and wife does not raise, according to the present condition of the authorities, any such presumption. Upon that matter I accept the law as laid down by Cozens-Hardy J. (as he then was) in *Barron* v. *Willis* (1), because I do not find that the explicit statement of the law by him in that case on this point was in any way dissented from either by the Court of Appeal or by the House of Lords, to which the case afterwards went. (2) I only mention that, as I say, in order to express my opinion as to what the effect would be if I found myself able to construe this contract according to the law of England. But I think the argument founded upon the proposition which is stated at p. 501 of the 2nd ed. of Mr. Dicey's book on the Conflict of Laws, that the capacity to alienate an immovable inter vivos or to make a contract with regard to an immovable is governed by the lex situs, really disposes of this case. In my opinion I am bound, when I find that one of the parties contracting with regard to immovables is, by the law of the country where the immovables

(1) [1899] 2 Ch. 578. (2) [1900] 2 Ch. 121; [1902] A. C. 271.

C. A. 1909 BANK OF AFRICA, LIMITED v. COHEN. Eve J.

are situate, under disability to contract, to hold that the disability goes to the root of the contract, and that, consequently, that disability or that incapacity subsisting, it is a contract which is a contract only in form, and in substance is one by which the person incapable of entering into it is not bound. In this case I am satisfied on the evidence that no one took the trouble, and, in fact, I doubt very much whether any one thought about it, to explain to this lady the benefits or privileges to which she was entitled under the Transvaal law as a married woman in regard to a contract of suretyship for her husband. Although she was a woman experienced in business and capable of understanding a business transaction, I cannot bring myself to believe that she carried in her mind from April, 1893, the last occasion on which it appears these privileges must have been explained to her, the recollection of what her privileges really were. It seems to me, from what has been deposed to with regard to the authorities in South Africa, that I should be drawing a conclusion of knowledge as against her not warranted by any of the authorities on the matter in South Africa. It does appear that, if within a short time before the execution of a particular contract or deed there has been explained to the married woman the nature of these privileges and benefits, she will be presumed to retain a remembrance of that explanation at the date of the execution; but I cannot regard the occasion—separated by a period of some ten years in the case of the first of these deeds and thirteen years in the case of the second of them—when these privileges were explained to her before she executed a mortgage in 1893 as an occasion so recent as to justify me in imputing to her a knowledge of these privileges and benefits in either 1903 or 1906. The result is that in my opinion, applying the lex situs, Mrs. Cohen was incapacitated from entering into this contract in 1903 and also in 1906, and, in these circumstances, I must treat the transaction as void. I must not only treat the documents, which are admittedly of no use as they stand, these powers of attorney, as void, but I must treat the contract, of which they are evidence, as also void. In these circumstances I am unable to give to the bank the relief they ask.

Then Mrs. Cohen says by way of counter-claim, "Upon that

assumption I claim to get back from the bank the documents of title which they have in their possession." On behalf of the bank it is said, "That is going a step further than it is necessary for the Court to go, because even although it may be impossible to enforce this agreement to give a mortgage over the property in question, having regard to all the circumstances, we ought not to be ordered to deliver to Mrs. Cohen the documents of title which we rightly hold, and which we allege we hold by way of security." That argument is attractive, but, though one desires, as I am fain to desire here, to protect the bank, it seems to me that under that argument lies this fallacy. The only way in which the bank have changed their character from being mere custodians of these documents to being chargee upon them is by virtue of the agreement upon which this action is founded, and, if I hold, as I find I am bound to hold, that the agreement is void, then it seems to me that every act which flowed from the supposed existence of a valid agreement is voided the moment the agreement itself is found to be void. In these circumstances, reluctantly, but consistently, as it seems to me, with the conclusions at which I have arrived, I must hold that the bank are not entitled as against Mrs. Cohen to retain these deeds. The action will be dismissed, but, having regard to all the circumstances of the case, without costs, and upon the counter-claim there must be an order for delivery by the bank to Mrs. Cohen of all documents of title in their possession relating to the property.

The plaintiffs appealed.

The appeal was heard on May 5, 6, and 7, 1909. C. A.

Stewart-Smith, K.C., and *George Wallace* (with them *Shearman, K.C.*), for the plaintiffs. The defendant was not incapacitated from entering into this contract and she is bound by it. According to the Roman-Dutch law, which is in force at Johannesburg, the suretyship of a married woman for her husband is not strictly prohibited, but the law confers upon her the benefit of the Senatus Consultum Velleianum and the Authentica if she chooses to claim it. By expressly renouncing the benefit of those laws a married woman may validly bind

C. A. 1909 BANK OF AFRICA, LIMITED v. COHEN.

herself as a surety for her husband, and it is immaterial whether her renunciation is at the date of the contract of suretyship or afterwards: Maasdorp's Institutes of Cape Law (1838 ed.), vol. iii. pp. 347—353; *Oak* v. *Lumsden* (1); Van Leeuwen's Roman Dutch Law, by Kotzé C.J., vol. ii. pp. 37, 605. In this case it is submitted that the defendant is estopped by her conduct in setting up this privilege against the plaintiffs.

Further, this contract is governed not by the lex situs, but either by the lex domicilii or by the lex loci contractus. It is immaterial under which of these two laws it comes, for the domicil of the parties has always been English, and the contract was made in England. This is not a contract which purports to deal with real property in Africa by way of conveyance. The Transvaal forms part of His Majesty's dominions, so the High Court in England has power under ss. 31 and 41 of the Trustee Act, 1893, to make an order vesting this property in us. Under ss. 34 and 54 of the Trustee Act, 1850, vesting orders have been made of lands in Canada: *In re Groom Trust Estate.* (2) There will, however, be no difficulty in obtaining a mortgage if the Court will direct the defendant to execute a power of attorney in the proper form.

Eve J. proceeded upon a statement in Dicey's Conflict of Laws, 2nd ed. p. 501, to the effect that the capacity to make a contract with regard to an immovable is governed by the lex situs. That statement is founded upon a passage in Story's Conflict of Laws, s. 463, but it is not supported by any authority.

[BUCKLEY L.J. referred to Westlake's Private International Law, 4th ed. ss. 165, 172.]

Sect. 216 of Mr. Westlake's book sums up the plaintiffs' argument—"Contracts relating to immovables are governed by their proper law as contracts so far as the lex situs of the immovables does not prevent their being carried into execution." The statement in Dicey loses sight of the distinction between the capacity to contract and the capacity to convey. It is the latter only which is governed by the lex situs. There is no authority in England precisely in point on this question, but Lord Macnaghten's general statement of the law regulating

(1) (1884) 3 Juta, 144. (2) (1864) 11 L. T. 336.

the capacity to contract in *Cooper* v. *Cooper* (1), so far as it goes, supports the plaintiffs' contention.

[KENNEDY L.J. referred to *Norris* v. *Chambres*. (2)]

The plaintiffs rely upon the principle stated by Lord Cottenham in *Ex parte Pollard*. (3) "If indeed the law of the country where the land is situate should not permit or not enable the defendant to do what the Court might otherwise think it right to decree, it would be useless and unjust to direct him to do the act; but when there is no such impediment the Courts of this country, in the exercise of their jurisdiction over contracts made here, or in administering equities between parties residing here, act upon their own rules, and are not influenced by any consideration of what the effect of such contracts might be in the country where the lands are situate, or of the manner in which the Courts of such countries might deal with such equities." But in exercising that jurisdiction the Court, of course, acts in personam only and not in rem. That principle has been repeatedly acted upon: *Lord Cranstown* v. *Johnston* (4); *Ex parte Holthausen* (5); *Duder* v. *Amsterdamsch Trustees Kantoor* (6); *Mercantile Investment and General Trust Co.* v. *River Plate Trust, Loan, and Agency Co.* (7); *Martin* v. *Martin* (8); *Campbell* v. *Dent* (9); *Cood* v. *Cood* (10); *In re Selot's Trust*. (11)

[BUCKLEY L.J. Those cases do not relate to capacity.

COZENS-HARDY M.R. referred to *In re Maudslay, Sons & Field*. (12)]

There are two American authorities which are directly in point and shew that the capacity to contract as to foreign land is governed by the law of the place where the contract is made: *Kelly* v. *Davis* (13); *Polson* v. *Stewart*. (14) In *Jacobs* v. *Crédit Lyonnais* (15) Bowen L.J., in delivering the judgment of the Court of Appeal, says, "The broad rule is that the law of a

(1) (1888) 13 App. Cas. 88, 108.
(2) (1861) 3 D. F. & J. 583.
(3) (1840) Mont. & Ch. 239, 250.
(4) (1796) 3 Ves. 170, 182.
(5) (1874) L. R. 9 Ch. 722.
(6) [1902] 2 Ch. 132
(7) [1892] 2 Ch. 303.
(8) (1831) 2 Russ. & My. 507.
(9) (1838) 2 Moo. P. C. 292.
(10) (1863) 33 Beav. 314.
(11) [1902] 1 Ch. 488.
(12) [1900] 1 Ch. 602.
(13) (1876) 28 La. An. 773.
(14) (1897) 167 Mass. 211; 57 Amer. State Rep. 452.
(15) (1884) 12 Q. B. D. 589, 600.

C. A. 1909 BANK OF AFRICA, LIMITED v. COHEN.

country where a contract is made presumably governs the nature, the obligation and the interpretation of it, unless the contrary appears to be the express intention of the parties": and the observations of the Lord Justice as to the authority of text-writers are also in point. The plaintiffs' contention is also supported by a passage in Burge on Colonial and Foreign Laws (1838 ed.), vol. ii. p. 844, where the law is thus stated: "In considering the law, by which the transfer of immovable property is governed, a distinction should be made between the contract to transfer, and the actual transfer of the dominium. There may be cases in which the law of the domicile, or that of the place of the contract, will prevail, notwithstanding that it may be opposed to that of the situs, whilst, in other cases, the law of the situs will prevent the contract taking effect." Applying that principle to the present case, there is nothing in the law of the situs which prohibits the defendant from giving effect to this contract. The only obstacle in her way is one which she can remove if she pleases, and it is an obstacle which does not relate to land at all. It is a mere accident that the land is affected. It is to the land itself that the lex situs applies; the capacity to contract is governed by English law. This is a good contract by English law. The agreement is contained in the recital in the power of attorney: *Buckland* v. *Buckland* (1); and there is nothing to prevent this Court from making an order for specific performance of it. Failing that, the plaintiffs ask for damages for breach of contract. In any event they are entitled to keep the title deeds, which are rightly in their possession.

P. O. Lawrence, K.C., and *G. F. Hart*, for the defendant. The whole question between the parties is concluded by the finding of fact of Eve J. that under the law of the Transvaal this contract is wholly void. The learned judge has found in terms that the defendant was incapacitated under the Roman-Dutch law from entering into this contract of suretyship, and he applied the principle of *Mackellar* v. *Bond*. (2) This is a contract relating solely to real estate—personal liability is expressly negatived—and the Courts of this country will not enforce a contract relating to real estate in a foreign country

(1) [1900] 2 Ch. 534. (2) 9 App. Cas. 715.

which by the law of that country is void for want of capacity. The passage in Dicey's Conflict of Laws, 2nd ed. p. 810, sums up the argument on behalf of the defendant. In *Ex parte Pollard* (1) there was no question of capacity, and if there were here no question of capacity, it may be that this contract might possibly give rise to a claim for damages. The power of attorney is useless because it tells the attorney to do something which he cannot do, and the agreement to execute a mortgage is wholly void by the law of South Africa. If authorities are admissible upon this question, which is a question of fact, *Mackellar* v. *Bond* (2) and Burge on Colonial and Foreign Laws (1838 ed.), vol. i. p. 234, conclusively shew that under the law the defendant was incapable of entering into this contract. Putting aside the question of capacity, there arises the question whether this contract ought to be construed by the lex loci or by the lex situs. It is only in the former case that damages could arise. Here the whole contract is to be performed in South Africa, and the inference is that it was the intention of the parties that the contract should be construed according to the law of that country. On either view, therefore, the lex situs applies. This argument covers also the claim of the plaintiffs to retain the title deeds. In the first instance they held these deeds for safe custody, and if the contract to charge the land is void it does not entitle the custodians to hold the deeds as pledgees. No doubt there might be an agreement to pledge the pieces of paper, but there is no such agreement in fact.

Stewart-Smith, K.C., in reply.

Cur. adv. vult.

May 28. BUCKLEY L.J. The first question in this case is whether the bank can, by way of specific performance, clothe themselves with the character of mortgagees of the land in Johannesburg. Upon this question the relevant instrument is the bond dated December 4, 1906, by which the defendant declares that she renounces in favour of the bank the benefit of all rights whatsoever which the laws of the Transvaal grant her in relation to the land. If this instrument be carefully scrutinized it will be

(1) Mont. & Ch. 239. (2) 9 App. Cas. 715.

C. A.
1909
BANK OF AFRICA, LIMITED v. COHEN.
Buckley L.J.

found that its whole operation and effect is to appoint an attorney to charge, mortgage, or transfer the land, and for that purpose to execute the necessary instruments and to appear before the Registrar of Deeds and make declarations of value, acknowledgment of indebtedness, and so on, and to take all steps necessary for recording and registering the same. The grantor is to incur no personal liability, and the acts which the attorney is empowered to do are exclusively acts relating to the land. The relevant law of the Transvaal is in this Court a question of fact. The learned judge has found the fact, and I agree with him in his finding. The substance of it is that he finds that unless and until a married woman who does not fall within certain exceptions has gone through certain formalities she is under the Roman-Dutch law incapacitated and incapable of entering into a contract of suretyship for her husband. I may expand that statement of the law and state my own view as follows:—A married woman's contract of suretyship for her husband cannot be described (in terms familiar in our own law) as being either void or voidable. It must be stated, I think, in the form that she has a contingent capacity to become bound by such a contract. Thus, if she holds a particular character, that of a trader, or if she receives a pecuniary benefit from the contract (a matter which may have to be ascertained ex post facto), or if after explicit explanation of the exact nature of her rights she formally renounces the Senatus Consultum Velleianum and the Authentica si qua mulier, she may be bound by such a contract. But unless and until some one of those conditions is satisfied the contingency upon which she becomes capable has not happened and she remains incapable of becoming bound by the contract. A renunciation in general terms such as those in the power of attorney of December 4, 1906, is not sufficient. She must renounce explicitly. If the true effect of the evidence is that she must renounce before the contract is entered into, specific performance is on that ground impossible, for the lady did not renounce before execution. If, on the other hand, renunciation before the contract is entered into is not essential, still the conditions under which the defendant would have become capable of contracting have not been satisfied, with the result, I think, that the contract, as one dealing

with an immovable in the Transvaal, is not and cannot by way of specific performance be rendered binding upon her. We were pressed with *Ex parte Pollard*. (1) That was a case in which there was no incapacity. The mortgagor was capax and had purported to mortgage the land, but according to the lex situs his mortgage was ineffectual. The land therefore was not bound. The mortgagor had power to mortgage, had contracted to mortgage, but had not mortgaged. According even to Scottish law, however, his contract to mortgage could have been enforced in personam although his mortgage had no effect in rem. What was held was that under those circumstances the property came into the hands of the assignees of the intending mortgagor charged with the equity contained in the contract. That is a decision which has no application where there is not capacity. A judgment for specific performance here would mean that this Court should order the defendant, after having had her rights explained to her, to renounce the Senatus Consultum Velleianum and Authentica si qua mulier, whereas the law to be applied is that the wife, after explanation of her rights, may refuse to renounce them. Specific performance in that sense is, in my judgment, impossible. Mr. Dicey's language (Conflict of Laws, 2nd ed. p. 501) I think is correct, that a person's capacity to make a contract with regard to an immovable is governed by the lex situs.

The second question is whether the defendant is liable in damages. Here it is necessary to consider also the bond of November 23, 1903. That bond did not exclude personal liability. The power in that case extended to allow the attorney to acknowledge the grantor's indebtedness to the bank in such sum as the attorney might fix. It seems to me, however, that that was superseded by the provision in the bond of 1906 which excluded personal liability. This question, therefore, again seems to me to fall to be determined only upon the bond of 1906. Here the question is as to liability in damages for breach of a contract relating wholly to acts to be done with reference to land in the Transvaal, acts which, if the previous portion of this judgment is right, were not done because the grantor was not capable of

(1) Mont. & Ch. 239.

C. A. 1909

BANK OF AFRICA, LIMITED v. COHEN.

Buckley L.J.

doing them. Here again the question is governed by absence of capacity. There can be no right to damages for not performing a promise to do an act which promise was not made because the promisor could not make it.

The third question is whether the bank are entitled to keep the deeds in right of a mere possessory lien. I think not. Upon the facts the deeds came into the possession of the bank for purposes of safe custody. When the alleged security was given they dealt with the deeds in a way in which they would have been entitled to deal with them if they were mortgagees, but if they are not mortgagees they hold them simply under the original contract by which they were lodged for safe custody. There was no fresh delivery of the deeds by the defendant on the terms that whether there was a mortgage or not upon the land the bank should have a possessory right to the deeds. In negativing the right of the bank to be mortgagees it seems to me to follow that they have no right to possession of the parchments and to retain those as against the person who has lodged them with the bank.

Upon all three points, therefore, the appellants, in my judgment, fail, and the appeal must, I think, be dismissed with costs.

KENNEDY L.J. This case is of an interesting nature and was argued before us at considerable length, but when the few material facts, including the law of the Transvaal, are properly appreciated, it presents, I think, no great difficulty.

The plaintiffs' claim is necessarily based upon the power of attorney given by the defendant to Mr. Wight, the manager of the plaintiffs' Johannesburg branch, on December 4, 1906. That instrument succeeded, and in my view superseded, an earlier instrument of November 23, 1903. It recites an agreement of the defendant with the plaintiffs to mortgage or transfer, as security for or in respect of advances made or to be made by the plaintiffs to the defendant's husband, certain real property of the defendant in the Transvaal, "but without incurring personal liability for the said advances."

The plaintiffs had previously made, and after the date of the power of attorney continued to make, advances to the

defendant's husband, and in November, 1907, they recovered judgment in this country against him for upwards of 6538*l.*

The plaintiffs sent out to the Transvaal the documents of title which had been deposited with them by the defendant, but registration was refused to them by the Land Registry there because the deed of December 4, 1906, was according to the law of the Transvaal invalid and ineffectual so far as it purported to bind the defendant's real property there in favour of the plaintiffs. The reason of such invalidity is this: By the law which prevails in the Transvaal, as also, according to the judgment of the Privy Council in *Mackellar* v. *Bond* (1), in Natal, a married woman cannot be effectually bound as a surety for her husband, even when she executes the deed by her own hand, unless she specifically and expressly renounces the benefit of the Senatus Consultum Velleianum, and also the benefit of the Authentica "si qua mulier," both of which enactments are embodied in the Roman-Dutch law received in the Transvaal. The effect of this privilege, except in certain circumstances which do not exist in the present case, and to which, therefore, it is unnecessary to refer, is to render the married woman's deed of suretyship altogether void in the Transvaal, unless she has specifically and expressly renounced her right to rely upon its privilege. It does not matter, for the purpose of our decision in this action, whether such renunciation, as Eve J. apparently held, must precede the married woman's engagement of suretyship, or, as I am inclined to think, upon the evidence as to the Roman-Dutch law, may also be made at a time subsequent to that engagement.

In the present case the defendant has not expressly and specifically renounced the benefit of her privilege, either before or in or after the deed of December 4, 1906. On the contrary, she relies upon it in her defence to this action. The general declaration in the deed renouncing and abandoning in favour of the plaintiffs the benefit of all rights which the laws of the Transvaal Colony give the defendant in relation to her real property is admittedly useless to the plaintiffs. Now it is a well-settled general rule of private international law as applied alike in

(1) 9 App. Cas. 715.

C. A. 1909

BANK OF AFRICA, LIMITED v. COHEN.

Kennedy L.J.

this country and in the United States (see for example the judgment of Holmes J. in *Polson* v. *Stewart* (1), which was cited to us in argument by the plaintiffs' counsel) that in regard to immovable property the lex situs, or, as it is sometimes styled, the lex rei sitæ, prevails in regard to all rights, interests, and titles in and to such property. An English Court will not assume jurisdiction to deal with either the property in or the possession of real estate which forms part of a foreign country, or, as here, of a colony (see Story, ss. 424 et seq., and Dicey, 2nd ed. pp. 510, 511, 810 et seq., on the Conflict of Laws; Westlake's Private International Law, 4th ed. p. 202; Foote's Private International Jurisprudence, 3rd ed. pp. 184 et seq.); and where, as we find to be the case here, the lex situs declares an instrument of suretyship intended to operate upon real estate to be void because of an incapacity of one of the parties, except upon certain conditions which have not been fulfilled, to bind herself by such an instrument, it is the duty of this forum to respect the lex situs and to treat the instrument as of no validity against that party. In such a case, where our Court recognizes an incapacity to contract so as to bind herself on the part of the person sued, it plainly cannot at the same time make a decree as the plaintiffs here ask, either for specific performance of the engagement by which she was incapable of binding herself, or, as the plaintiffs alternatively ask, award damages for its non-performance. There have been, no doubt, cases where our Courts have by their judgment indirectly affected real property out of the jurisdiction, where the parties to the action have been within the jurisdiction, as the parties to this action are. Acting in personam and not in rem—"upon the conscience," in the language of one of these judgments, "of the person living here," *Lord Cranstown* v. *Johnston* (2)—the Court has given effect to contractual or equitable rights and so indirectly affected, as I have said, immovable property abroad. Several of these cases, such, for example, as *Ex parte Pollard* (3), were cited to us in argument, and most, if not all of them, are referred to and classified in Mr. Foote's work, pp. 186, 192. But in none of those cases have

(1) 167 Mass. 211. (2) 3 Ves. 170, 182.
(3) Mont. & Ch. 239.

our Courts given effect to a contractual or equitable right in personam which the lex rei sitæ would treat as incapable of creation. No case has been cited to us, and, upon principle, I should be surprised if any could be found, in which this jurisdiction in personam has been assumed where, according to the lex situs, the party sued was incapable of making the contract sued upon, and where therefore the Court of the country in which the property indirectly to be affected lay would treat the English decree, in the language of Lord Campbell in *Norris* v. *Chambres* (1), as "brutum fulmen." I will only add that in regard to the claim for damages I fail to see in the power of attorney of December 4, 1906, any undertaking of personal liability by the defendant upon which a claim for damages could be based.

There remains the question as to the right to possession of the title deeds which the defendant in her counter-claim asks may be redelivered to her. Eve J., with reluctance, as he states in his judgment, acceded to this prayer, and in my judgment he was right in doing so, and substantially for the reasons which he has stated. I say "substantially" because I think, upon the evidence, that prior to the execution of the deed of December 4, 1906, the bank held the title deeds, not as mere custodians, but by virtue of the agreement of November 23, 1903, as appears in the statement of facts in the *Law Times* report. (2) But the deed of December 4, 1906, superseded the earlier deed, and I agree that thenceforward the title deeds were held by the bank by virtue only of the later deed, and if that deed is void, as I hold it to be, against the defendant, the right of the plaintiffs to retain the deeds against the will of the defendant has gone.

COZENS-HARDY M.R. I agree.

Solicitors: *Budd, Johnson & Jecks; Michael Abrahams, Sons & Co.*

(1) 3 D. F. & J. 583. (2) 100 L. T. 296.

H. B. H.

C. A.
1909

COPE *v.* CROSSINGHAM.

[1907 C. 3331.]

April 29, 30; *May* 21.

Trade Union—Branch—Secession—Threatened Distribution of Funds—Ultra vires—Action by Head Trustees for Injunction and Payment over of Branch Funds—"Directly enforcing agreement"—Trade Union Act, 1871 (34 & 35 *Vict. c.* 31), *s.* 4, *sub-s.* 3 (*a*); *s.* 8.

A resolution was passed by the members of a branch of a registered trade union that they would secede from the parent society and distribute the funds amongst the members of the branch. The rules of the society contained no provision as to the secession of branches. The trustees of the branch having declined to pay over the funds under their control to the head trustees, when required so to do, according to the rules, the head trustees brought an action against the trustees of the branch for a declaration that the resolution was ultra vires, an injunction, and payment to them of the funds of the branch:—

Held (Cozens-Hardy M.R. doubting), (1.) that the action, apart from the claim for payment, was not instituted with the object of directly enforcing an agreement for the application of the funds to provide benefits to members within the meaning of the Trade Union Act, 1871, s. 4, the object being to preserve the fund by preventing it from being misapplied without in any way administering it, and (2.) upon the construction of the rules, that the society had a sufficient interest in the property of the branch to maintain the action.

But *held*, that the Court had no jurisdiction to make any order for payment.

Appeal from a decision of Eve J. (1)

The plaintiffs, other than the plaintiff Hatchell, were the head trustees of the Municipal Employees' Association, and the plaintiff Hatchell was joined as a member of the Woolwich branch of the society. The defendants were the trustees and the secretary of the Woolwich branch. The Municipal Employees' Association was a trade union constituted with districts and branches and registered under the Trade Union Acts, 1871 and 1876, and at the date of these proceedings was governed by rules registered on October 16, 1905.

Rule 1, section 2, provided that the society should consist of men, women, and young persons employed by any municipal authority in Great Britain and Ireland.

Rule 2, which was headed "Contributions," provided (section 1)

(1) [1908] 2 Ch. 624.

that every man on joining the society should pay 1*s.* as entrance fee, 3*d.* for a copy of the rules, 1*d.* for a contribution card, and 2½*d.* per week as contributions, and 1½*d.* per annum to the labour representation fund, and directed that all the sums of 1½*d.* paid by members should be remitted to the head office for labour representation purposes. Section 2 dealt with the contributions of females and young persons.

Rule 3, which was headed "Benefits," dealt with funeral claims, claims for legal assistance in respect of accidents, claims for dismissals, and claims for permanent accident gratuities, and by that rule all such claims were to be sent in to the branch secretary, who was to send them on to the general secretary at the head office, and they were then to be adjudicated upon by the national executive council.

Rule 6, which was headed "Constitution and Powers of Executive Council" (thereinafter referred to as the N. E. C. or the E. C.), provided (so far as material) as follows:

"Section 1. The general management of the association shall be vested in the national executive council, which shall consist of the general secretary and one member from each district, who shall be elected at the district annual conference or by a vote of branches in the district in each year."

"Section 3. The duties and powers of the N. E. C. shall be:—

"(*d*) Decide what branches shall constitute each district, open or close any branch, and suspend from all benefits or privileges any branch, member or members. . . . .

"(*l*) Make levies on branch funds for head office purposes, and order levies on members to keep the funds in a solvent condition. . . . .

"(*n*) See that all branch officers and others comply with these rules, and see that the funds of the association are devoted solely to the purposes set forth in these rules. . . . .

"(*q*) In all matters that may arise in which these rules are silent, the E. C. shall be the final authority to settle the matter. . . . .

"(*u*) They shall be the final authority to vote any of the funds of the association away for any purpose not stated in these rules."

C. A. 1909 COPE v. CROSSINGHAM.

Rule 15 was headed "Constitution and Management of Branches." Section 1 provided for the formation of branches and the appointment of branch officers and for the opening of an account in the Post Office Savings Bank in the name of the branch trustees. Section 2 regulated the contributions to be paid by members and was substantially a repetition of rule 2. Section 3 empowered each branch to make by-laws for its own guidance subject to the approval of the national executive council. Section 4 provided that, except at the formation of a new branch, every candidate should be proposed and seconded by members of the branch and adopted by a majority of the members present. Section 6 authorized branches taking part in trade union demonstrations to make certain payments to banner carriers. Section 7 provided that members owing more than 5*s.* 5*d.* should be erased from the books and forfeit all they had paid.

Section 8 provided as follows: "No branch can part with any of its funds for any purpose other than is specified by these rules except by sanction of the N. E. C. . . . . and any branch secretary who pays away any money of his branch without such authority will be held personally responsible for the same."

Rule 17, which was headed "Branch Secretary and Trustees," required the branch secretary to send in to the head office quarterly returns, together with 1*s.* 6*d.* for each financial member on his branch books (a financial member being one who did not owe more than one quarter's contributions) and all entrance fees received during the quarter, and it also required him to remit to the head office 6*d.* per member for legal aid purposes at the end of each year, and all money received for labour representation purposes in England and Wales. The rule also directed him to carry out all instructions he might receive from the general secretary, and it contained the following clause:—"At the expiration of his appointment or any other time that the branch, N. E. C. or the general secretary may require he shall deliver up all books money property etc. belonging to the association." It further provided that he should be responsible for all moneys of the branch. Section 2 provided for the election by each branch of three trustees, who were to decide which one should hold the

bank book and take the money from the branch secretary to be banked, and it also stipulated that they should withdraw all or any of the branch funds on request from the branch secretary, subject to an appeal to the general secretary in case they were not satisfied that the money was required for the legitimate purposes of the association. They were not to withdraw any money without the request of the branch secretary or a written request from the general secretary.

Rule 22 was headed "Sick Section." By this rule any branch might allow its members to join this section where there were twenty or more members willing to join. Each member was to pay 4*d*. a week as contributions and was to be entitled after six months' membership of the fund to certain weekly payments in case of sickness or accidents. These payments were to be made by the branch secretary.

By section 8 of the rule, when the funds of any branch exceeded for twenty members 5*l*., fifty members 10*l*., above fifty members 15*l*., all further additions to the fund were to be forwarded to the head office of the association, to be kept as the reserve sick fund, and should the funds of any branch at any time be exhausted through continual sickness the national executive council were empowered to grant such branch a sum from such reserve fund to tide over its difficulties.

The rules also provided for the election of general auditors and branch auditors and for the quarterly auditing of the accounts, in the case of the head office by general auditors and in the case of a branch by branch auditors (rules 11 and 19), and they fixed the salaries to be paid to the various head and branch officers (rule 24). The rules contained no provision enabling a branch to secede from the parent society.

It appeared that every person on joining this society became a member of a branch, and he received a certificate of membership which was signed by the branch secretary and was in the following form:—

"Certificate of Membership.

"This is to certify that M —— was duly admitted a member of the —— branch of the Municipal Employees' Association on the —— day of —— 19 ."

C. A. 1909

COPE v. CROSSINGHAM.

Early in 1907 the society suspended from his duties Albin Taylor, the general secretary of the society.

On February 18, 1907, a meeting of the members of the Woolwich branch was held, when the following resolution was passed: "That unless Mr. Albin Taylor is reinstated as general secretary of the Municipal Employees' Association this branch decides to secede their membership from the Municipal Employees' Association on and after this date and that the money be drawn from the Post Office Savings Bank and distributed amongst the members."

Taylor was not reinstated, and Richard Davies was appointed general secretary in his place.

In May, 1907, Davies required the secretary of the Woolwich branch to pay over to him the funds of the branch in accordance with rule 17, but he declined to do so, and he and the trustees of the branch withdrew the moneys of the branch, amounting to 32*l.*, made up of the trade fund and the sick fund, and proposed to distribute these moneys among the members of the branch.

The plaintiffs thereupon commenced this action, claiming (1.) a declaration that the resolution of February 18, 1907, was ultra vires; (2.) an injunction restraining the defendants from distributing the funds of the branch amongst the members of the branch or from dealing with them otherwise than in accordance with the rules of the society; (3.) the removal of the defendant trustees and the appointment of new trustees of the branch; (4.) if and so far as necessary administration by the Court of the funds of the branch.

After the issue of the writ the executive council resolved to suspend the seceding members from all further benefits in the society.

At the trial the plaintiffs asked that, in lieu of an order removing the present trustees of the Woolwich branch, an order might be made directing the said trustees to pay over the money in their hands to the head trustees, and Eve J. treated the action as an action asking for that relief, and claim 3 as amended accordingly.

The learned judge held that the society had a sufficient interest under the rules in the property of the branch to

maintain the action notwithstanding the provisions of s. 4 of the Trade Union Act, 1871, and he made a declaration that the proposed distribution was ultra vires and not in accordance with the rules. He also granted liberty to apply for an injunction, but he declined to order payment to the head trustees on the ground that that would be administering the funds of the society.

The plaintiffs appealed against this judgment in so far as it refused to order the defendant trustees to pay over the funds in their hands to the head trustees, and there was also a cross-appeal by the defendants against the judgment in so far as it declared that the action was maintainable.

H. S. Preston, for the plaintiffs. The question is whether the Court has jurisdiction in an action by the trustees of the union against the trustees of a branch to order the defendants to hand over to the plaintiffs funds which admittedly the defendants have applied contrary to the laws of the union. The learned judge made a declaration that the proposed application of the funds was ultra vires, and he ought to have gone on to grant an injunction and make an order for payment. The question turns primarily upon s. 4, sub-s. 3 (*a*), of the Trade Union Act, 1871 (1), and upon the rules of the union: see rules 2, 3, 6, 15, 17, 22. Sects. 8, 9, 10, and 11 of the Act of 1871 and s. 3 of the Act of 1876 also bear upon the case. Upon the construction of the rules and in the events which have happened the funds in question are practically the funds of the union and not of the branch. The payments of members are contributed not wholly to the branch, but partly to the union, inasmuch as the entrance fees and certain other payments are handed over to the head office; all benefits, except sick pay, are paid by the head office, and the head office guarantees the sick pay. The executive council have very extensive powers of control over the branches and

(1) The Trade Union Act, 1871, s. 4, provides:

"Nothing in this Act shall enable any Court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements, namely,

. . . . .

"3. Any agreement for the application of the funds of a trade union,—

"(*a*) To provide benefits to members . . . ."

C. A. 1909 COPE v. CROSSINGHAM.

can compel them to observe the rules; and they are the final authority to determine the destination of the funds in any case not provided for by the rules. The rules do not in terms provide for the secession of branches from the parent body, and therefore the decision of the executive council is final. The application by the defendants of these funds in the manner proposed is directly prohibited by the rules, and the learned judge has so held. This is not an action instituted with the object of directly enforcing an agreement for the application of the funds of a trade union to provide benefits to members within s. 4, sub-s. 3 (*a*), of the Act of 1871. The object of this action is not the division, but the protection of the funds. It is an action to keep the funds intact by preventing them from being misapplied, and therefore the Court has jurisdiction to maintain it: *Howden* v. *Yorkshire Miners' Association*. (1) The only distinction between that case and the present is that in that case the action was brought by an individual member, whereas here it is brought by the trustees of the union. This, therefore, is an a fortiori case, and Lord Davey, who was one of the two dissentient judges in the House of Lords, thought that the former action might have been maintained if it had been constituted as this one is. *Madden* v. *Rhodes* (2) shews that a civil proceeding by head trustees against branch trustees to recover funds in the hands of the latter can be entertained. *Wolfe* v. *Matthews* (3) is also in point.

[COZENS-HARDY M.R. Does not that case shew that there is no jurisdiction to make an order for payment?]

That was an action by members.

[COZENS-HARDY M.R. But it was on behalf of themselves and all other members.]

Fry J. in the hypothetical case which he there put was contemplating an order for payment to the plaintiffs, and their only right was qua members. The plaintiffs here are not seeking to enforce any payment to a member; they are only seeking to enforce the protection of the aggregate fund. There is nothing in s. 4

(1) [1903] 1 K. B. 308; affirmed sub nom. *Yorkshire Miners' Association* v. *Howden*, [1905] A. C. 256.

(2) [1906] 1 K. B. 534.

(3) (1882) 21 Ch. D. 194; 51 L. J. (Ch.) 833.

of the Act of 1871 to prevent the union from attacking a trustee for breach of trust, and an order to pay is the ordinary relief which the Court would not hesitate to grant for a moment in an action of that kind. That is not an order for administration: *In re Barrett* (1); and therefore the objection of Eve J. that in making an order for payment he would be administering the funds of the union falls to the ground. Unless the plaintiffs can obtain an order for payment they can have no effective relief in this action. That cannot have been the intention of the Legislature.

J. D. A. Johnson, for the defendants. The Court has no jurisdiction to entertain this action. The primary object of the Trade Union Act, 1871, as explained by Jessel M.R. in *Rigby* v. *Connol* (2), was to prevent the officers of trade unions from robbing them; it was not intended that the contracts entered into by the members of the union should be made legal contracts inter se so that Courts of justice should interfere to enforce them. There is nothing in the Act to give the Court any jurisdiction to deal with matters of internal management. That case was followed by the Court of Appeal in *Chamberlain's Wharf, Ld.* v. *Smith*. (3) *Duke* v. *Littleboy* (4) is a direct authority in favour of the defendants. That case was not overruled by the House of Lords in *Howden's Case*. (5) Except the two dissenting judges who approve, Lord Lindley alone refers to it, and he distinguishes it. That case is on all fours with the present, and it is distinguishable from *Wolfe* v. *Matthews* (6) and also from *Howden's Case* (5) both in the form of the action and in the nature of the relief claimed. Here the plaintiffs have contributed nothing to the fund in question, and the action is really against the members of the branch who have subscribed to the fund. In form, no doubt, it is against the trustees of the branch, but it is really against their cestuis que trust, because the trustees are merely giving effect to the resolution of the branch that the branch shall be dissolved and the money distributed. There is nothing in the rules to suggest that a dissolution of a branch coupled with a

(1) (1889) 43 Ch. D. 70.
(2) (1880) 14 Ch. D. 482.
(3) [1900] 2 Ch. 605.
(4) (1880) 49 L. J. (Ch.) 802.
(5) [1905] A. C. 256.
(6) 21 Ch. D. 194.

C. A. 1909 COPE v. CROSSINGHAM.

distribution of the funds among the members is a wrongful act. The branch is entitled to dissolve, but then it sacrifices all benefits from the society. It forfeits the moneys which have been paid to the head office, but it does not forfeit the money in its hands. Assuming that an injunction were granted, that would not be an end of the proceedings, as is shewn by this appeal, because an order for payment is wanted. The plaintiffs are attempting to obtain by a side wind that which they cannot obtain directly, and inasmuch as the Court has no power to make a declaration where it cannot give consequential relief this declaration is useless and ought not to be made: *Barraclough* v. *Brown*. (1) Further, this branch is an independent entity. Sect. 8 of the Trade Union Act, 1871, recognizes that a branch as distinct from the central body may have real and personal property and provides for the vesting of that property in the trustees of the branch. That section is amended by s. 3 of the Act of 1876, which adds the words "or of (sic) the trustees of the trade union, if the rules of the trade union so provide." But here the rules contain no such provision; therefore the property remains the property of the branch. The money is in the hands of the branch trustees for the benefit of the branch, and the trustees of the central body cannot sue for payment of the money, though they have certain disciplinary powers over the branch. Apart from the rules there is no vesting of the money in the central trustees. The certificate of membership shews that no one can become a member of the society except by becoming a member of a branch and it is signed by the branch secretary. There is no privity between the members of a branch and the parent body except as to special levies: see rule 6, section 3 (*l*). The rules shew that the branches have almost complete autonomy amongst themselves: see rules 15 and 17. The plaintiffs are entirely outside parties and have no right to call upon the defendants to pay any moneys contributed by those whom they (the defendants) represent.

H. S. Preston, in reply.

Cur. adv. vult.

(1) [1897] A. C. 615, 623.

May 21. COZENS-HARDY M.R. The Municipal Employees' Association is a registered trade union. Its rules are so obscure and so inartistically framed that it is by no means easy to interpret them. But the following propositions seem to me to be correct:— (1.) It is a trade union with branches. (2.) A man is admitted a member of a particular branch, and not of the union as a whole, and elected a member by the branch. (3.) There are branch trustees, elected by the branch members, and there are head trustees, appointed by the national executive council. (4.) The general management of the association is vested in the national executive council, with large powers to suspend from all benefits or privileges any branch or any member. (5.) The contributions of members are paid to the officers of the branches to which they belong. (6.) The head office funds are produced by payments made by the branches in respect of (*a*) entrance fees, (*b*) a sum of 1*s.* 6*d.* per quarter for each member, and (*c*) an annual sum for each member for legal expenses and for parliamentary representation. (7.) The branch funds are produced by payments made by members; out of these funds the administration expenses of the branch are paid, and also sick pay; should there be a sum in hand beyond a certain limit, the excess is to go to a reserve sick fund at the head office, and in case of deficiency the branch can claim assistance out of this reserve sick fund. (8.) Funeral claims and accident claims are paid out of the head office funds, but through the branch secretary. (9.) Accounts are audited quarterly, the branch accounts by auditors appointed by the branch, and the head office accounts by auditors otherwise appointed. (10.) There is no provision for the secession of a branch.

In February, 1907, a duly convened meeting of the Woolwich branch was held, when it was resolved that, in an event which happened, the branch "secede their membership" from the union, and that the money be drawn from the Post Office Savings Bank and distributed among the members. All the members of the branch were parties to, or subsequently concurred in, this resolution.

It seems that other branches took the same course, and the national executive council resolved to take proceedings for the

C. A. 1909

COPE v. CROSSINGHAM.

Cozens-Hardy M.R.

purpose of recovering all money and other properties of the association held by the seceding branches; and they subsequently resolved that no further benefits be paid to members of seceding branches. This action is really a test action.

The plaintiffs are the head trustees and the defendants are the trustees of the Woolwich branch. The statement of claim sought (1.) a declaration that the resolution of February, 1907, was ultra vires; (2.) an injunction; (3.) the removal of the defendant trustees and the appointment of new trustees; and (4.) administration by the Court of the funds and property of the branch. The defence denied that the branch still exists, and alleged that the defendants held the branch funds for the persons who had been members of the branch, who were their cestuis que trust; and they pleaded the Trade Union Act, 1871. Eve J. made a declaration as asked by the prayer, but declined to order payment of the funds to the plaintiffs, and gave liberty to apply for an injunction. The plaintiffs appeal against the refusal to order payment, and the defendants by their cross-notice appeal against the whole judgment.

It is conceded by the appellants that the action could not have been maintained before the Act of 1871; but they assert that there is nothing in s. 4 which deprives them of their right to recover from the defendants money and property legally vested in the plaintiffs as trustees of the association. Now by s. 8 of the Act of 1871 the real and personal estate "of any branch of a trade union shall be vested in the trustees of such branch," and not in the trustees of the union. It is true that by s. 3 of the Act of 1876 s. 8 is amended by inserting after the words "trustees of such branch" the words "or of the trustees of the trade union, if the rules of the trade union so provide." But I am clearly of opinion that there is nothing to be found in the rules of this trade union to prevent the application of s. 8. Indeed it is plain that the rules contemplate and expressly provide that the branch funds shall be vested in the branch trustees. This seems to strike at the root of the plaintiffs' title to require payment of the money in the hands of the defendants. It is no doubt true that the rules contain numerous provisions for payment of various sums out of branch funds to the head office and

to other persons (such as branch secretary and branch auditors and members for sick pay), and on the other hand for payment by the head office of various sums to or for the benefit of the members of the branch. This, however, involves the administration of the funds according to the rules, and to order payment would be a direct enforcement of an agreement for the application of funds to provide benefits to members, and would therefore fall within s. 4. I do not intend to indicate an opinion that new trustees of the union could not maintain an action to recover union funds from former trustees, and the same would apply to new trustees of the branch as against former trustees of the branch. That would not involve any administration. But I am unable to apply that principle in the present case. I think the branch trustees never were trustees of the union and were never accountable as such. Eve J. has held, and the Lords Justices agree, that the plaintiffs, although not entitled to require payment of the money, have a sufficient interest in the branch funds to entitle them to an injunction to restrain the defendants from dealing with the branch funds otherwise than in accordance with the rules. I feel some doubt on this point—a doubt based upon the hopeless obscurity of the rules; but I am not prepared to formally dissent from the view which is taken by my colleagues.

It follows that Eve J.'s judgment must be affirmed and an injunction granted, and the cross-notice must be dismissed. There should be no costs of the appeal.

BUCKLEY L.J. There are two questions in this case, the one a question of law of general importance arising on s. 4 of the Trade Union Act, 1871, and the other a question arising upon the construction of the rules of this particular union.

The first question is whether this action is a legal proceeding instituted with the object of directly enforcing an agreement for the application of the funds of the union to provide benefits to members. Those are the only words in s. 4 of the Act of 1871 relevant to this case. I do not address myself particularly to the word "directly." It may well be that that word means (by way of contrast) enforcing by direct order as distinguished from enforcing by the recovery of damages for breach. This action is

C. A. 1909 COPE v. CROSSING-HAM. Buckley L.J.

not, I think (within any meaning of the word "directly"), such a legal proceeding as is excluded by s. 4. The nature of the action is as follows. There are funds in the hands of the defendants. The trustees of the union say, We are entitled to prevent the misapplication of those funds, we desire to preserve the fund, we do not ask the Court in any way to administer the fund. In this action the Court has nothing to do with the right of any member to a distributive share of the fund. All the Court is asked to do is to see that the fund is preserved, leaving its proper destination as between the members entitled to share in the fund wholly unaffected by any judgment which the Court is asked to pronounce. By the decision in *Wolfe* v. *Matthews* (1) and the opinions of the learned Lords in *Yorkshire Miners' Association* v. *Howden* (2) it is, I think, decided that such an action can be maintained. In the last-mentioned case Lord Davey dissented. But in my judgment his opinion is not contrary to, but is in favour of, the view which I have expressed. The majority of the learned Lords were of opinion that where the question was whether moneys were being rightly paid to members an action brought to restrain their misapplication was not a direct enforcement. In other words, they held that to enforce negatively by preventing misapplication was not to enforce directly. In this view Lord Davey did not agree, but he did agree that if the question was not of payment to members at all, but of preservation for the benefit of such members as might be entitled, the action could be maintained. "I am disposed," he says (3), "to think that the trustees might have maintained this action against the original defendants under the powers given to them by s. 9 of the Act." In the present action the relief asked consists of a declaration that a resolution to divide amongst some of the members was ultra vires, an injunction to restrain such division, and an order for the appointment of new trustees and the vesting of the funds in them. There is added, it is true, in paragraph 4 of the claim, a prayer for administration so far as may be necessary. No such judgment, however, has been pronounced by Eve J., and no such judgment is asked from this

(1) 21 Ch. D. 194. (2) [1905] A. C. 256.

(3) [1905] A. C. 270.

Court. In my opinion the action is one which can be maintained for the purposes of paragraphs 1, 2, and 3 of the prayer.

The second question depends upon the proper construction of the rules, and upon these it is not strange if opinions should differ. The rules are full of difficulties. For convenience I refer to the pages of the rules. At p. 6 provision is made for the formation of the society, and there is a definition of membership. Members are members of the society and may become such by becoming members of a branch. They are not members of a branch as distinguished from members of the society. On joining the society members make contributions as stated at p. 7 and again at p. 30. The member receives a certificate of membership which certifies that he is admitted a member of the —— branch of the society. There does not seem to be any machinery for becoming a member, except by joining a branch, but it is difficult to say that a man could not become a member by joining at the head office and paying under the provision at p. 7. When a man joins a branch he becomes a member of the society, not a member of the branch as distinguished from the society. The society, as it seems to me, might exist when there was no branch. As I read the rules, the branches are not separate unions. There is no rule that the society shall or may consist of branches. The society consists only of members who are natural persons and who become members by joining a branch. On joining the member pays 1*s.* entrance fee, 3*d.* for rules, and 1*d.* for his card. He subsequently pays 2½*d.* a week, and also 1½*d.* at the end of the year for labour representation purposes. These contributions are disposed of as follows:—All entrance fees are paid to the head office at the end of the quarter (p. 33); the 1½*d.* for labour representation purposes is paid at once to the head office (pp. 7 and 30), the 3*d.* and the 1*d.* are retained by the branch. Out of the 2½*d.* a week (which is equal to 2*s.* 8½*d.* a quarter) the branch sends to the head office at the end of the quarter 1*s.* 6*d.* for each financial member, a financial member being one who is not more than a quarter in arrears (p. 33). The substance of this is that all entrance fees and 1*s.* 6*d.* out of the 2*s.* 8½*d.* a quarter go to the head office, and that the branch keeps 1*s.* 2½*d.* per member per quarter. The

C. A. 1909 COPE v. CROSSINGHAM. Buckley L.J.

sick fund exists as a separate fund; the member pays 4*d.* per week (p. 39); the branch pays the sick fund moneys to the head office, subject to retaining 5*l.*, 10*l.*, or 15*l.*, as the case may be (p. 41). All the rest is handed over to the head office. This is all I need say about contributions.

As regards benefits, funeral claims are made through the branch secretary, but are paid by the head office (pp. 8 and 9). Proceedings for compensation in respect of accident are taken by the head office, seemingly at the expense of the society, if the head office so determine (p. 10); payments for dismissals are made by the head office (p. 11). Permanent accident gratuities are paid by the head office (p. 11); sick allowance is paid by the branch (p. 40), but if the branch has not sufficient funds it applies to the head office, which has power to grant the branch a sum from the sick reserve fund to tide it over its difficulties (p. 41). The outcome of the above is that in substance the head office pays all benefits, except that the branch keeps the sick fund in hand to a limited amount, which presumably is sufficient to answer current demands, and calls upon the head office for any deficiency.

The branch has a good many salaries to pay (pp. 43, 44). The sums of 1*s.* 2½*d.* a quarter per member which it retains are presumably to meet those expenses and some other trivial expenses, such as payments to banner carriers (p. 30). I cannot find that any other destination is indicated for so much of the fund as the branch retains, except that it is subject to levies to be made by the head office.

The head office can make levies on the branch funds for head office purposes (p. 18), and the branch office cannot deal with any of its funds for any purpose other than as specified by the rules except by sanction of the executive council (p. 31). The executive council are the final authority to vote any of the funds of the association away for any purpose not stated in the rules (p. 19).

The executive council can open or close any branch and can suspend from all benefits any branch member or members (p. 17). A branch has no power to secede.

When a member has once joined he need not continue to pay,

but if he does not he will, after six months' arrears, be erased from the books and will forfeit all he has paid (p. 31).

The outcome of these provisions, I think, is that the branch does not exist as a separate trade union; that the provisions as to branches, branch officers, and branch trustees and the aggregation of branches into districts are all mere matter of subdivision of the affairs of the body; and that, although a branch has under the rules separate trustees, it has not separate funds in the sense of being entitled as regards such sums as under the rules are from time to time left in its hands to a right to those funds in the branch as distinguished from a right to them in the society.

Supposing there were fifty members in the branch and that forty of them ceased to pay, it is quite plain that after six months those forty would have no further right in respect of the funds. When all fifty cease to pay, every member of the branch ceases to have any interest in the funds. To divide the funds amongst the fifty members would, it seems to me, be in breach of plain provisions of the rules (see for instance pp. 19 and 31). The funds are not funds of the branch as distinguished from the union, but funds of the branch as a constituent part of the union. The plaintiff Hatchell claims to be still a member of the branch. Whether he is or not, the closing of the branch is an act which under the rules could only be done by the national executive council. They have not closed it. They have only resolved not to pay the seceding members anything more. Moreover, if they had closed the branch they could open it again. The existence and continued vitality of the branch is dependent not upon acts to be done by the branch or its members adversely to the union, but by the national executive council as controlling amongst other things the existence of the branch. The language of the rules (p. 17) is that the national executive council may open a branch; this must be by inviting persons to join the society by becoming members of the new branch which theretofore did not exist. They can so invite persons, I think, now, and the machinery may thus be set in motion by which further members of the branch can come into existence and the continued existence of trustees of the branch ensured. The order which the learned judge

C. A. 1909 COPE v. CROSSINGHAM. Buckley L.J.

pronounced is, I think, quite right, except that I think he should have gone on to grant an injunction. He has declared the resolution of February 18, 1907, to be ultra vires, has declared that the branch trustees hold the branch funds upon the trusts declared by the rules, and has given liberty to apply. Under that liberty effect can be given to the rights of preservation of the fund, as for instance by an order to hand over the funds to new branch trustees if and when such shall be appointed. His order should, I think, be affirmed, but there should be added to it an order for an injunction restraining the defendants, the branch trustees, from distributing the branch funds amongst the members of the branch or dealing with the same otherwise than in accordance with the rules. The cross-appeal, which affirmed that the action could not be maintained and asked for an order declaring that the funds belonged to the branch, should, I think, be dismissed. The appellants not having succeeded in obtaining an order for payment, there should be no costs of the appeal. The dismissal of the cross-appeal will be with costs if there are costs of the cross-appeal.

KENNEDY L.J. This is a case of some difficulty, due in part to the disputable effect of the language of the Trade Union Act, 1871, s. 4, which has led to the remarkable divergence of judicial interpretation in *Howden* v. *Yorkshire Miners' Association* (1), and in greater part to the looseness and imperfection of the 1905 code of rules of the Municipal Employees' Association, whose affairs form the subject of the consideration of this Court.

The dispute in the present case has sprung from a resolution of the Woolwich branch to secede from the central organization. There is no provision in the rules for such an event. They contain no agreement for the solution of the questions which almost certainly must arise whenever such a secession takes place, both in regard to funds then in the possession of the branch and also in regard to funds on which, though in the possession of the central organization, the branch as representing its members has a right of call for the purpose of paying to

(1) [1903] 1 K. B. 308; [1905] A. C. 256.

the branch members of the association the benefits to which the rules entitle them. It is in reference to the first of these two questions only that we have in this action to decide. The material points may be stated very shortly. The association, which, according to rule 1, section 2, consists of persons employed by any municipal authority in Great Britain and Ireland, is constituted by a central body, called the national executive council, and by local branches, which may or may not be grouped into districts, and from which elected representatives are sent to form the national executive council. The branches, in their inception, are created, and during their existence are controlled, by the authority of the national executive council. The branch collects contributions due from its members, but is bound quarterly to render accounts to the head office and to remit to it the bulk of those contributions, retaining only, I think, sums sufficient for the administration expenses of the branch, including payments to officers and banner carriers, and for its sick fund. It is the head office which, out of the contributions from the branches, allots and, as I understand the rules, generally distributes the benefits to members and makes such other payments in the name of the association as the national executive council directs. By rule 6, section 3 (*e*), the national executive council is empowered to make levies on branch funds for head office purposes.

So far, a branch would seem to be merely one of several subordinate parts of one centrally controlled association possessing certain powers of local administration, but, except that it can retain in its hands enough to cover the cost of local management and the needs of its sick fund, acting financially as a mere vehicle for receiving and passing on to the head office the contributions of the members of that branch and for distributing the amounts allotted as benefits by the head office. Under rule 22, section 8, a branch is not entitled to retain surplus funds beyond 15*l.* (as a maximum), the amounts below 15*l.* being regulated according to a scale which depends upon the size of the branch. If the surplus in its hands exceeds the maximum, the excess must be remitted to the head office of the association to form part of a reserve sick fund, from which subventions may

C. A. 1909 COPE v. CROSSINGHAM. Kennedy L.J.

be made by the national executive council to any branch whose sick fund happens to be exhausted. By rule 15, section 8, no branch can part with any of its funds for any purpose other than as specified by the rules, except by the sanction of the national executive council. By rule 6, section 3 (*q*), it is provided that the national executive council shall be the final authority to vote any of the funds of the association away for any purpose not stated in the rules. A branch may make by-laws for its own guidance, but they must be approved by the national executive council (rule 15, section 3). At the same time (and the respondents to this appeal much rely upon this), the real and personal estate of the branch is by law (see the Trade Union Act, 1871, s. 8, and the Trade Union Act Amendment Act, 1876, s. 3) and the rules of this association vested, not in the trustees (called in the statement of claim the "head trustees") of the association, but in the trustees of the branch. They are appointed by the vote of the members of the branch. The banking account of the branch stands in their name. They are responsible both for paying in and drawing out money. The accounts are audited quarterly by auditors appointed by the branch.

The present action has been brought in consequence of the secession, as I have already said, of the Woolwich branch of this association on February 18, 1907, according to a resolution carried at a duly convened meeting of the branch, which also provided that the existing funds should be drawn from the Post Office Savings Bank and distributed amongst the members of the branch. The national executive council has refused to recognize the claim of the Woolwich branch to sever itself in this way from the association, and has brought this action for the purpose, in substance, of preventing the funds of the branch being distributed amongst its members in accordance with the resolution of February 18, 1907. In the names of the head trustees of the association and one George Hatchell, who was a member of the Woolwich branch, and who, as I understand, has at some time asserted that he disapproves of the resolution to secede, the national executive council has sued the trustees of the branch and the branch secretary, claiming (1.) a declaration that the resolution of the Woolwich branch to divide its funds

amongst its members was ultra vires; (2.) an injunction to restrain the defendants from making such a division or from dealing with the funds otherwise than in accordance with the rules of the society; (3.) the removal of the defendants from the office of trustees, the appointing new trustees, and an order that the defendants do transfer to such new trustees the funds and property of the Woolwich branch; (4.) so far as may be necessary the administration by the Court of such funds and property. It is common ground in the present case that at the time of the secession, in February, 1907, the defendant trustees had under their control a sum of money—some 40*l.*, I think—which, if the relations between the branch and the association had remained normal, would in accordance with the rules have been payable by them to the head office at the end of the current quarter, and this is the sum which the plaintiffs, on behalf of the association, seek to affect by their claims in the present action.

The defence put forward by the defendants is twofold. In the first place they contend that, upon the true construction of the rules, there is no legal right given to the representatives of the central body, or any other persons suing on its behalf, to interfere, as the plaintiffs seek to do in this action, with the disposal of funds vested in the trustees of that branch. Secondly, they say that s. 4 of the Trade Union Act, 1871, prevents the successful maintenance of legal proceedings to obtain any part of the relief claimed by the plaintiffs.

Taking this second line of defence first, I am of opinion that it cannot be made effective, so far as regards the first two claims for relief. It appears to me that to make the declaration and to grant the injunction asked for cannot after the decision of the House of Lords in *Howden* v. *Yorkshire Miners' Association* (1) be held to be wrong as constituting a violation of the statutory enactment against a legal proceeding "instituted with the object of directly enforcing an agreement for the application of the funds of a trade union to provide benefits to members." The defendant trustees of the Woolwich branch have threatened to obey the resolution of the branch meeting of February 18, 1907,

(1) [1905] A. C. 256.

C. A. 1909 COPE v. CROSSINGHAM. Kennedy L.J.

by distributing the funds in question amongst members of the branch, not as "benefits" under the rules at all, or for any purpose named or contemplated in the rules, but substantially as gifts to those members. In my view, this would be a dealing with the trust funds ultra vires; and the present action, so far as the prayer for a declaration and the prayer for an injunction are concerned, is a legal proceeding to declare that such a dissipation of the funds collected from the group of members forming this branch and held by the defendant trustees for the objects of the association as stated in the rules is ultra vires, and to prevent it by an injunction of the High Court of Justice. Neither form of relief touches the application of these funds in the provision of benefits to members. The Scottish case of *M'Laren* v. *Miller* (1), which is cited in the report of *Howden* v. *Yorkshire Miners' Association* (2), appears to me to be very much in point, as the facts were like those of the present case. The Motherwell branch of the Amalgamated Society of Railway Servants had "seceded" from the central organization just as the Woolwich branch has done, and had passed a resolution to "uplift" moneys in the branch and to retain them in the hands of certain members of the branch until the secretary of the branch should prepare a scheme of division of the amount among the members of the branch, and that the funds should be thereafter divided. The trustees of the association sued for an interdict, and the defendants, the trustees of the branch, set up the defence of the 4th section of the Trade Union Act, 1871. The Court held that it was untenable, and granted an interdict that "the defenders are not to part with the funds until the rights of the members of the branch society and of the central body be determined."

As to the defendants' first contention, which is independent of the 4th section of the Trade Union Act, 1871, and depends upon the effect of the rules of 1905, I have felt that the question is not free from difficulty owing to the imperfection of the rules of 1905. The property of the branch is undoubtedly vested (see the Trade Union Act, 1871, s. 8, and the Trade Union Act Amendment Act, 1876, s. 3) in the trustees of the branch. But upon the whole, having regard to the rules, and especially to

(1) (1880) 7 R. 867, 873. (2) [1905] A. C. 256.

those to which I have adverted in the earlier part of this judgment, I am of opinion that those funds ought to be treated, as between the association and the branch, as funds also of the association; or, in other words, that they ought to be treated as funds of the branch as a part of, and not as distinct from, the association. So far as regards the particular moneys to which this action relates, they were under the rules collected by the officers of the branch, and have come into the control of the trustees of the branch upon trust to be remitted (subject to deduction for administration expenses, for the sick fund, and I think also for some small payment to banner bearers) to the head office of the association, to be distributed from the head office through the proper officials in the form of benefits to members according to the rules, and also used in part for such other purposes of the association as the national executive council may direct. Having regard to the constitution of this society, I hold that the present plaintiffs, and indeed any members of the association, are so far interested in the funds in the hands of the Woolwich branch, and in the proper use of them by the trustees of the Woolwich branch, that the present action is well founded.

In my judgment the plaintiffs are entitled to the declaration and the injunction for which they have sued in this action. The relief sought under heads (3.) and (4.) of the plaintiffs' claim should not, I think, be granted. As the branch no longer exists, and, so far as I can gather from the facts before us, there are no members of the association who have formed, or who have asked the association to form, a new Woolwich branch, I do not see how new trustees of that branch to whom a transfer of the funds in question could be made can be appointed; and I am inclined to think that an order to administer the fund would infringe the provisions of the Trade Union Act, 1871, s. 4.

In regard to this appeal I concur in the order which has been stated by the Master of the Rolls.

Solicitors: *F. A. S. Stern; Edward C. Kilsby & Son.*

H. B. H.

C. A.
1909
May 4, 5, 21.

In re BROCKMAN.

[1908 B. 2328.]

Solicitor—Bill of Costs—Taxation—Application by Client to tax within One Month after delivery of Bill—Common Order to tax—Submission to pay—Items barred by Statute of Limitations—Solicitors Act, 1843 (6 & 7 *Vict. c.* 73), *s.* 37.

On an application within one month of delivery of a bill of costs the client has an absolute right to have the bill taxed without any money being brought into Court and without any submission to pay. After the expiration of one month there is no such absolute right, but a submission to pay is not in any case a necessary part of a common order to tax. If a submission is inserted, it should be a submission to pay not what is due, but what is payable having regard (inter alia) to the defence of the Statute of Limitations, and questions arising under that Act should be dealt with by the taxing Master.

In any case in which the client seeks an order for delivery of papers the order should direct taxation also of the statute-barred items, so as to ascertain the amount for which the solicitor has a lien upon the papers.

Common form of order altered accordingly.

Appeal from a decision of Warrington J. (1)

On May 14, 1908, Lewis James Drake Brockman, a solicitor, who had acted as solicitor and clerk to the Sandgate Urban District Council and their predecessors the Local Board of Health of the district of Sandgate, delivered to the council certain bills of fees, charges, and disbursements amounting in the aggregate to 435*l.* 10*s.* 8½*d.* These bills included items alleged by the council to be barred by the Statute of Limitations.

On June 12, 1908, within one month after the delivery of the bills, the council took out a summons under the Solicitors Act, 1843, asking that it might be referred to the taxing Master to tax and settle the bills, the taxation and settling to be with the usual directions, but on the footing (inter alia) that all fees, charges, and disbursements (if any) which, or the remedies for the recovery of which, were barred by statute at the date on which the bills wherein they were respectively comprised were delivered should be disallowed. The summons did not ask for delivery up of any documents, therefore no question as to the solicitor's lien arose.

(1) [1909] 1 Ch. 354.

Warrington J. held that the common order to tax, which contained a submission by the clients to pay what should be found due on taxation, was the proper order to be made, and refused to insert a direction to the taxing Master to disallow statute-barred items.

The council appealed.

H. Terrell, K.C., and *G. Solomon*, for the appellants. A client who applies within a month after the delivery of his solicitor's bill of costs is entitled to an unconditional order for taxation without any submission to pay. The Solicitors Act, 1843, s. 37, is imperative in the case of an application within the month. After the month, or after verdict or twelve months, the case is different. Under paragraph 2 of s. 37 the Court has not jurisdiction to impose any conditions before granting taxation or to introduce a submission to pay: *In re Pender.* (1) The earlier statute of 2 Geo. 2, c. 23, which was made perpetual by 30 Geo. 2, c. 19, s. 75, did require, as a condition for taxation, a submission by the client to pay, but that statute was repealed by the Solicitors Act, 1843, which contains no such condition where application for taxation is made within the month.

In the King's Bench Division no submission to pay is inserted —Cordery on Solicitors, 3rd ed. p. 310—whereas in the Chancery Division a submission to pay is required. This practice is wrong. The practice of the two Divisions is discussed in *In re Norman* (2), which shews that no practice can alter the statutory rights.

[KENNEDY L.J. referred to *In re Hirst & Capes.* (3)]

The summons was taken out in the present form in consequence of the observations in *In re Margetts.* (4) Where delivery up is asked for the Court has a discretion as to the form of order: *In re Murray* (5); *Ex parte Jarman.* (6) Chitty's Forms, 13th ed. p. 9, contains no submission to pay, and it was admitted in the Court below that in the King's Bench Division these orders do not contain any submission.

In the absence of special directions it is the practice in the

(1) (1846) 2 Ph. 69, 77.
(2) (1886) 16 Q. B. D. 673.
(3) [1908] 1 K. B. 982.
(4) [1896] 2 Ch. 263, 266.
(5) [1867] W. N. 190.
(6) (1877) 4 Ch. D. 835.

C. A. 1909

BROCKMAN, *In re.*

taxing Master's office to strike out statute-barred items: *Curwen* v. *Milburn* (1); *Budgett* v. *Budgett.* (2)

[COZENS-HARDY M.R. We have asked the taxing Masters to furnish us with a memorandum as to the practice in the taxing Master's office.]

The appellants ask first for a simple order to tax without any submission to pay, but if a submission to pay is insisted upon, then the order should contain a direction to disallow statute-barred items. Seton on Judgments, 6th ed. vol. i. pp. 268, 269, gives a submission to pay in the common form order for taxation, but that form includes an order for delivery up of papers. In *In re Bromley* (3) a distinction was made between the case of an application to tax within a month and that of an application to tax after the expiration of a month from the delivery of a bill. An order to tax without any submission to pay was made in *In re Thurgood* (4), following *In re Pyne* (5), and in *Watson* v. *Postan* (6) an order was made without requiring the undertaking prescribed by 2 Geo. 2, c. 23. [*Ex parte Ditton* (7) and *In re Park* (8) were also cited.]

Cave, K.C., and *F. E. Ward*, for the respondent. The only question raised by the summons is whether there ought to be a special direction as to the statute-barred debts. No order can be made with a special direction to disallow statute-barred items. The Statute of Limitations is a weapon of defence, not of offence, and is not available to a plaintiff, and whether the submission to pay is inserted or not, there ought not to be any direction to disallow statute-barred debts.

It is the practice in the Chancery Division for the client to submit to pay whether the debts be statute-barred or not. If it is desired to raise the defence of the Statute of Limitations the client must wait until he is sued. The uniform practice has therefore been not to make an order to tax except upon a submission to pay and thus avoid a second action on the bill. An undertaking to pay was inserted in *In re Elmslie & Co.* (9)

(1) (1889) 42 Ch. D. 424.
(2) [1895] 1 Ch. 202, 214.
(3) (1844) 7 Beav. 487.
(4) (1854) 19 Beav. 541, 544.
(5) (1848) 5 C. B. 407.
(6) (1832) 1 Dowl. 556.
(7) (1880) 13 Ch. D. 318.
(8) (1889) 41 Ch. D. 326.
(9) (1869) L. R. 9 Eq. 72.

The latter part of s. 43 of the Solicitors Act, 1843, applies only to references in common law Courts.

[KENNEDY L.J. It cannot be right that the order should prevent the client from having the benefit of the remedy given to him by the law of his country.]

At common law the order can be followed by an order to pay, but in the Chancery Division that cannot be done without a submission, and a further application is necessary. If the application for taxation is made by the solicitor he cannot enforce payment except by action: *In re Debenham and Walker.* (1) It is reasonable to require a submission by the client if he makes the application for taxation. Why should he put the solicitor to the expense of taxation if he means to dispute the bill altogether? It is the established practice that where the application is by the client an order for taxation is never made without his submission to pay: *In re Battams and Hutchinson.* (2) All the forms of orders to tax in such cases given in Seton on Judgments, 6th ed., and Pemberton's Judgments, Orders, and Practice of the Supreme Court, 4th ed., contain a submission to pay, even where delivery of papers is not asked for. No distinction between cases in which delivery of papers is asked for and cases where it is not is suggested in Daniell's Chancery Practice, 7th ed., or Daniell's Chancery Forms, 5th ed. No doubt at common law the practice is different and a submission is not required: Chitty's Archbold's Queen's Bench Practice, 14th ed. vol. i. p. 147; Form 41 in Appendix K to Rules of the Supreme Court, 1883, set out in the Annual Practice for 1909, vol. ii. p. 152. [They also referred to the note to *In re Hirst & Capes.* (3)]

Solomon, in reply.

Cur. adv. vult.

May 21. COZENS-HARDY M.R. read the judgment of the COURT (Cozens-Hardy M.R., Buckley and Kennedy L.JJ.) as follows: This appeal raises an important question as to the right of a client who, within one month after the delivery by a solicitor of bills containing items which are alleged to be statute-

(1) [1895] 2 Ch. 430. (2) [1897] 1 Ch. 699, 703.
(3) [1908] 1 K. B. 982, 986.

C. A. 1909

BROCKMAN, *In re.*

barred, seeks to obtain an order for taxation in such a form as will not compel him to pay statute-barred items, the client not desiring to claim the return of papers or to interfere with any lien which the solicitor may have. It incidentally has brought to our notice a striking difference in the practice of the Chancery Division as compared with the King's Bench Division. We have had the advantage of communicating with the senior taxing Master, who, after consultation with his colleagues, has furnished us with a memorandum.

The statute of 1843 is the governing statute. By s. 37, on the application within one month of delivery of a bill, the client has in our opinion an absolute right to have the bill taxed and settled without any money being brought into Court and without any submission to pay. The words are that the Court is "required" to refer the bill for taxation. If taxation is applied for after the expiration of one month, there is no such absolute right, but the Court may refer the bill to taxation with such directions and subject to such conditions as the Court thinks proper. The words are "it shall be lawful." The earlier statute of 2 Geo. 2, c. 23, which was made perpetual by the statute 30 Geo. 2, c. 19, and was repealed by the Act of 1843, required as a condition for taxation a submission by the client to pay. No such condition is to be found in the Act of 1843, and we can see no justification for requiring such a submission where the application is within one month of delivery. On the construction of the Act of 1843 this seems to be reasonably clear. Form 41 of Appendix K to Rules of the Supreme Court, 1883, is important, for it gives the proper form of order without any such submission even where delivery of papers is sought for. The practice in the King's Bench Division has been, and is, to make the order without requiring a submission to pay: see Chitty's Archbold's Queen's Bench Practice, 14th ed. vol. i. p. 147. But in the Chancery Division, where the great majority of non-litigious taxations have been dealt with, the order of course has ever since 1843 contained the submission to pay. This is probably a relic of the earlier practice under the statute of George II.

The scheme of the Act of 1843 is peculiar. If the solicitor delivers a bill of costs, and the client within one month applies

for taxation, the Court restrains the solicitor from commencing or prosecuting any action pending the reference for taxation; and, assuming that the reference results in a certificate in favour of the solicitor, he can, without issuing a writ, apply under s. 43 for an order for payment. We think that the Act does not deprive the client of the right to rely upon the Statute of Limitations. The proceedings, it is true, are initiated by the client and not by the solicitor, but nevertheless they are of such a nature that the solicitor gets the benefit of them. The analogy of claims by creditors in an administration suit is very close. We therefore think that the order to tax ought to be so framed as not to impose upon the client a burthen greater than he would have to bear if he were sued by the solicitor.

The effect of requiring a submission to pay, as interpreted by Kekewich J. in *In re Margetts* (1), is to prevent the client from relying upon the Statute of Limitations. In the earlier case of *Budgett* v. *Budgett* (2) the same learned judge had expressed emphatically a different view, and we understand from the taxing Masters that until *In re Margetts* (1) the taxing Masters had been in the habit of striking out statute-barred items. Since, however, *In re Margetts* (1) the practice has changed. In our opinion the submission to pay is not really necessary in any case, for s. 43 of the Act enables an order to be made in any Division for payment of the certified balance. Nevertheless, where the client is appealing to the discretion of the Court, a submission to pay in a modified form may be not only free from objection, but a reasonable saving of expense. The submission avoids the necessity of a separate application under s. 43. In our opinion the submission should be in every case only a submission to pay, not what is due, but what is payable, by which we mean what is payable, having regard (inter alia) to the defence of the Statute of Limitations. In any case in which the client seeks an order for delivery of papers the order should direct taxation also of the statute-barred items, so as to ascertain also the amount for which the solicitor has a lien upon the papers.

Warrington J. felt himself bound to follow the practice which has existed so long. In our opinion we ought not to attach too

(1) [1896] 2 Ch. 263. (2) [1895] 1 Ch. 202, 214.

C. A. 1909

BROCKMAN, *In re.*

great weight to a practice which has been confined to the Chancery Division, and which, so far as our information goes, has not been often applied in the Chancery Division to taxation within one month where delivery of papers is not asked. It seems highly desirable that the practice should be made uniform in both Divisions. The form suggested by the taxing Master seems to meet the difficulty by directing, where any submission is required, that the submission is only to pay what is certified as "payable," by which is meant recoverable, having regard to (inter alia) the Statute of Limitations, and by directing the taxing Master, where necessary, to certify what is "due," as distinct from "payable," with a view to ascertain the amount for which there is a lien. Where, however, the client applies within one month after delivery of a bill and does not claim delivery up of papers, no submission to pay ought to be inserted. The result is that, in our opinion, this appeal must be allowed, and a simple reference ordered to tax the costs, and to certify the amount payable by the petitioner to the solicitor, or by the solicitor to the petitioner. If the client does not object to a submission to pay in the qualified form above suggested, the submission may of course be inserted.

It will be for the taxing Master to deal with any question under the Statute of Limitations, subject, of course, to review by the judge.

The form suggested by the taxing Master should be used in all Divisions so as to secure uniformity of practice. In any case in which (1.) no submission to pay can be exacted, or (2.) no delivery of papers is desired, such parts of the printed form as are not appropriate should be struck out.

The respondent must pay the costs of the appeal. The costs in the Court below should be costs in the taxation, and will be paid by one or other party according as one sixth is, or is not, taxed off.

Solicitors: *John Hands, for J. Shera Atkinson, Sandgate; White, Borrett & Co., for Brockmans, Folkestone.*

The alterations suggested by the taxing Master and sanctioned by the Court in the common form of order of course to tax bills delivered

within one month (Seton on Judgments, 6th ed. vol. i. p. 268) were as follows:

"Upon the petition of this day preferred unto this Court it was alleged that the petitioner employed the above-named that the said solicitor on or about the day of delivered unto the petitioner bill of fees and disbursements which as the petitioner advised ought to be taxed

"That the petitioner submits to pay what shall *be certified as payable* to the said solicitor on the taxation of said bill It was therefore prayed and it is accordingly Ordered that it be referred to the taxing Master to tax and settle the said bill and that the petitioner and also the said solicitor do produce before the said Master upon oath as he shall direct all books papers and writings in their custody or power respectively relating to the matters hereby referred or any of them and that they be examined touching the same matters or any of them as the said Master shall direct And it is Ordered that the said solicitor do give credit for all sums of money by received of or on account of the petitioner and that be at liberty to charge all sums of money paid by to or on account of the petitioner And it is Ordered that if such bill when taxed be less by a sixth part than the said bill as delivered the said Master do tax the petitioner costs of this reference and if such bill when taxed shall not be less by a sixth part than the said bill as delivered the said Master do tax the said solicitor costs of this reference and the said Master is to certify the amount *payable by or* due from the petitioner to the said solicitor or *payable by* to the petitioner as the case may be having regard to the costs of this reference so as to be taxed as aforesaid and any sum or sums of money which may have been so received or paid as aforesaid And it is Ordered that the amount so to be certified *as payable* be paid within 21 days after service of this order and of the taxing Master's certificate to be made in pursuance thereof by the party from whom to the party to whom the same shall be certified to be *payable* unless the Court shall upon special circumstances to be certified by the said Master otherwise order upon application to be made within one week after the date of the said Master's certificate by the party liable to pay such amount And it is Ordered that upon payment by the petitioner to the said solicitor of what may be certified to be *payable or* due to as aforesaid or in case it shall appear that there is nothing due to he the said solicitor do deliver to the petitioner upon oath all deeds books papers and writings in custody or power belonging to the petitioner And it is Ordered that no proceedings be commenced against the petitioner in respect of the said bill pending this reference but the said Master is to make his certificate in a month (unless the said Master shall extend the time to enable him to make his certificate) or this order is to be of no effect."

The memorandum furnished by Mr. W. F. Baker, the senior taxing Master, omitting formal parts, was as follows:

In compliance with your Lordships' directions I beg to report as follows as to taxations under the Solicitors Act by a client in relation to statute-barred items in the solicitor's bill of costs and as to revising and assimilating

C. A.
1909
BROCKMAN, *In re.*

the practice in the Chancery and King's Bench Divisions on the subject. Dealing first with the practice of the taxing Masters before *Curwen* v. *Milburn*, 42 Ch. D. 424, I believe I am right in saying that up to that time (1889) the taxing Master did entertain and deal with objections to statute-barred items and tax them off if the statute applied. Taxations, where the question of the Statute of Limitations seriously arises, are very infrequent and the older practice is difficult to state from reported cases, but in *Curwen* v. *Milburn*, 42 Ch. D. 424, the taxing Master had in fact disallowed statute-barred items, and in the earlier case of *Re Murray*, [1867] W. N. 190, the taxing Master had done the same thing. Then came *Curwen* v. *Milburn*, followed by the decisions of Mr. Justice Kekewich of *Budgett* v. *Budgett*, [1895] 1 Ch. 202, *Re Margetts*, [1896] 2 Ch. 263, more fully reported in 65 L. J. (Ch.) 479, and *In re Hughes*, [1899] W. N. 125. It appears from the report of *In re Margetts* in the *Law Journal* that Mr. Justice Kekewich had consulted Mr. Ryland, one of the most experienced taxing Masters, as to the practice, and his Lordship's statement thereon in *Budgett* v. *Budgett*, [1895] 1 Ch. 202, 214—"But if I am right, as I believe I am, in saying that it has never been the practice at the taxing Masters' office to tax such items," i.e., statute-barred items—was, I think, based on what his Lordship had understood to be Mr. Ryland's view of the practice. Mr. Ryland is dead, but I have his notes of cases, which are very careful, and I find under the heading of "Statute of Limitations" the following note made in 1889:—"*Curwen* v. *Milburn*, 42 Ch. D. 424. Under the common order to tax solicitors' bills I have hitherto always disallowed statute-barred items unless preserved by lien on documents or otherwise. In the above case the Court of Appeal throws doubt upon this point. Notwithstanding the doubt I still think I am right." It is with diffidence that I quote these notes, which were only made for reference by the taxing Master himself, and for the assistance, if need be, of his colleagues, but Mr. Ryland was rightly regarded by the taxing Masters as the best authority amongst us on the practice in taxations. Mr. Justice Kekewich's statement of the practice in *Budgett* v. *Budgett*, [1895] 1 Ch. 202, was some six years later than *Curwen* v. *Milburn*, 42 Ch. D. 424, and of course, in deference to the remarks of the judges in *Curwen* v. *Milburn*, Mr. Ryland and the other taxing Masters would modify their own views on the subject, and would, after the decisions of Mr. Justice Kekewich to which I have referred, tax in accordance with those decisions; but I cannot trace any taxations of recent years in which the question has been seriously raised under the common order. None of the present taxing Masters have had such a case. I am obliged therefore to report that there cannot be said to be any definite modern practice on the point, and that whatever the older practice was it must be taken to have been altered by the decisions of Mr. Justice Kekewich following *Curwen* v. *Milburn*, 42 Ch. D. 424.

In connection with the older practice I may point out that questions of quite as much difficulty were, and are still, disposed of by the taxing Master under the common order to tax. I am throughout only dealing with orders at the instance of the client, and I purposely quote old authorities. The taxing Master may, under the common order, consider the propriety of the proceedings and the soundness of the advice upon which they were based:

see *Wiggins* v. *Peppin*, (1839) 2 Beav. 403; *In re Clark*, (1851) 13 Beav. 173; on appeal, 1 D. M. & G. 43. See at p. 46:—"Mr. Follett, one of the taxing Masters, . . . : attended their Lordships and stated that the universal practice of all the taxing Masters was to enter into the questions above referred to where the circumstances of the case required it in taxing bills of costs." The taxing Master decides questions of retainer: *In re Bracey*, (1845) 8 Beav. 266. In *In re Hair*, (1847) 10 Beav. 187, 191, Lord Langdale said: "The last question is, whether there ought to be a trial of the question of retainer. What is there to try? There is nothing in this which may not as well be tried by the taxing Master as by a jury. The taxing Masters are in the daily habit of trying such questions without any difficulty." The practice is unchanged: see *In re Herbert*, (1887) 34 Ch. D. 504, *per* Mr. Justice North. The taxing Master is to consider the effect of special agreements as to costs. Where for instance there was an agreement to charge costs out of pocket only the common order to tax was made: *In re Ransom*, (1854) 18 Beav. 220. As to agreement to pay more than usual charges, see *In re Eyre*, (1847) 10 Beav. 569, where Lord Langdale says: "On communicating with the taxing Masters, I find that, under the common order for taxing bills, they take into consideration such agreements as this." It is difficult to believe that, where the taxing Masters daily exercised the wide powers indicated in these cases, they should feel themselves unable to deal with the question of statute-barred items; and though I cannot find any old authority on the point, I think that the earlier practice was most probably that on which Mr. Ryland had always acted as stated in his note. In regard to special orders dealing with the question of statute-barred items, I find that in *In re John Thomas Brown*, a solicitor, &c.—1906, B. 2025, not reported—Mr. Justice Swinfen Eady made, on the application by originating summons of executors of a client, an order dated February 15, 1907, upon hearing counsel in Court on both sides, that the solicitors' bills of costs should be referred to the taxing Master to tax and settle "with liberty to the applicants to rely upon the Statute of Limitations in respect of any items therein." I can find no other case.

Turning now to the future, if it is thought expedient that the practice should be revised so that the objection to statute-barred items may be entertained and decided by the taxing Master without special order, subject of course to review by the judge in the usual way, a slight alteration in the common form would effectuate this. If the client's submission to pay is to pay what shall be certified to be "payable" (instead of as at present to pay what is "due") and the Master is ordered to certify what is "payable or due," the Master would decide any question under the Statute of Limitations, tax off items to which the statute was in the circumstances an effective bar, and if no question of lien arose, would certify the result as in any ordinary taxation. His decision could then be appealed in the usual way. If part of the bill were statute-barred, but the solicitor had a lien on papers or deeds, or for other reasons desired it, the taxing Master could certify this part of the bill as "due" and the claim to a lien. The taxing Master has power under the Solicitors Act, 1843, to certify specially any circumstances relating to the bill or taxation. The accompanying form of revised order will, I

C. A.
1909
BROCKMAN, *In re.*

think, answer the purpose. The form of petition will be correspondingly varied.

With much respect I suggest that the practice be modified in the way I have indicated, and be made uniform in both divisions.

H. C. R.

SWINFEN EADY J.
1909
June 10.

In re WEST.
WEST *v.* ROBERTS.

[1908 W. 572.]

Probate—Revocation—Mesne Acts of Executors—Specific Legacy—Bequest of Shares to A.—Assent of Executors—Transfer—Discovery of Codicil—Shares given to B.—Recovery of Shares—Mesne Income—Common Law Action.

Specific shares bequeathed to A. were duly transferred to A. by the executors after probate and assent. Some years later a codicil was discovered revoking the bequest to A. and giving the shares to B., but not changing the executors. The original probate was revoked and a fresh probate, including the new codicil, granted to the same executors:—

Held, that the specific legacy having in fact been assented to, the legal title with the right to sue for the legacy at common law vested in B., the actual legatee at the testator's death, and he could therefore recover both the shares and the mesne income from A.

Saunders' Case, (1599) 5 Rep. 12a, and *Graysbrook* v. *Fox*, (1565) 1 Plowd. 275, applied.

Gittins v. *Steele*, (1818) 1 Swans. 199 (a pecuniary legacy), and *Jervis* v. *Wolferstan*, (1874) L. R. 18 Eq. 18, 26 (a share of residue), distinguished.

ACTION.

By her will dated February 25, 1898, Emma J. West devised and bequeathed her residuary real and personal estate to her executors and trustees upon trust for sale and conversion, and directed them to hold the net proceeds (after providing for debts, funeral and testamentary expenses, legacies, and annuities) upon trust for her children Charles, Josephine, Isabelle, and Clara in equal shares. Each share was settled as therein mentioned, the son taking a protected life interest, and the daughters life interests without power of anticipation.

By a first codicil dated October 17, 1902, the testatrix revoked the provisions for the settlement of Josephine's and Isabelle's shares and gave them their shares absolutely.

The second codicil of March 13, 1903, is not material.

By a third codicil dated July 27, 1903, the testatrix bequeathed one third of her preference and ordinary shares in J. & E. Atkinson, Limited, to Josephine, one third of the same shares to Isabelle, and one third of the same shares to her trustees upon the trusts of Clara's fourth share of residue.

The fourth codicil of April 2, 1904, is not material.

The testatrix died on July 17, 1904, and her will and four codicils were proved on August 30, 1904. After first transferring the shares into their own names as shareholders, the executors and trustees duly transferred one third of the shares to Josephine and one third to Isabelle and retained one third as trustees of Clara's settled share.

On December 8, 1907, the testatrix's sister-in-law, Mrs. King, died. Among her papers was a sealed envelope on which the testatrix had written "To be opened only after the death of Mrs. King should I predecease her. If occasion demands to be returned to Emma J. West 19 Clevedon Square Hyde Park W."

This envelope contained a fifth codicil dated June 16, 1904, whereby the testatrix revoked the third codicil and bequeathed a fourth part of the Atkinson shares to each of her children Josephine, Isabelle, and Charles absolutely, and a fourth part to Clara in settlement according to the will.

On January 9, 1908, the original probate of the will and four codicils was revoked, and on November 28, 1908, new probate of the will and five codicils was granted to the same executors.

In the meantime, namely, on February 26, 1908, the plaintiff Charles brought this action to recover one fourth of the shares and one fourth of the dividends from the testatrix's death from the defendants Josephine, Isabelle, and Clara and the trustees respectively. Josephine and Isabelle admitted the plaintiff's right to the shares and transferred their proportion pending the action. Clara was willing that the trustees should transfer on the order of the Court.

The defendants did not, however, admit the plaintiff's right to share in any dividends paid before December 8, 1907, when the fifth codicil was discovered,

SWINFEN EADY J.

1909

WEST, *In re.* WEST *v.* ROBERTS.

Hon. Frank Russell, K.C., and *P. F. S. Stokes*, for the plaintiff. The executors' assent to a legacy relates back to the testator's death, and where the legacy is specific the interest vests in the legatee and he has a common law right of action to recover it. The dividends or fruits of the legacy, of course, follow the same title.

Kerly, for Josephine and Isabelle. The defendants are not liable to refund the intermediate income: *Gittins* v. *Steele* (1); *Jervis* v. *Wolferstan*. (2)

[SWINFEN EADY J. Those were cases of a pecuniary legacy and a share of residue for which no action at law would lie: *Jones* v. *Tanner* (3); *Johnson* v. *Johnson*. (4) They do not touch the question of a specific legacy for which the specific legatee can sue at common law. The plaintiff had a legal title to these shares.]

The defendants had a legal title under the first probate and the shares were transferred. The revocation of the probate put an end to the executors' title, but how did it affect the legal title of the transferees?

Sect. 77 of the Court of Probate Act, 1857 (20 & 21 Vict. c. 77), provides that an executor who has acted under a revoked probate may reimburse himself in respect of any payments made by him which the executor under the new probate might have lawfully made, but it contains no provision as to the payee or transferee. The transferees had a good title at common law, and the only way in which the shares can be recovered is by following the assets under the equitable jurisdiction, in which case intermediate interest is not allowed.

The revocation of probate takes effect only from the time of the recall: *Boxall* v. *Boxall*. (5)

[SWINFEN EADY J. As soon as the executors assented to the specific bequest it vested at law in the plaintiff as at the testatrix's death.]

There was no actual assent under the new probate. If any assent at all can be presumed, it can only be an assent qualified

(1) 1 Swans. 199.
(2) L. R. 18 Eq. 18, 26.
(3) (1827) 7 B. & C. 542.
(4) (1802) 3 B. & P. 162, 169.
(5) (1884) 27 Ch. D. 220, 224.

by their proper acts under the old probate. That would at most be an assent to the legacy minus the spent dividends.

[SWINFEN EADY J. "If lessee devises his term and dies, and then his executors do waste, and afterwards assent to the devise, an action of waste in the tenuit lies against the executors": *Saunders' Case.* (1)]

They could not, of course, set up their own wrong by assenting to a bequest subject to their acts of waste.

[SWINFEN EADY J. An executor has been allowed after probate to sue in detinue against a purchaser under a prior grant of administration: *Graysbrook* v. *Fox.* (2)]

It was not averred that the administrator was compellable to make the sale. In the present case the executors were legally compellable to transfer the shares under the first probate.

[SWINFEN EADY J. If your argument is correct, the plaintiff cannot recover the shares at all.]

He cannot recover them at law, and if he follows the assets in equity he will not get the intermediate income.

W. E. Vernon, for Clara. I adopt the same argument. Suppose a revoked will left 1000*l.* cash to A. and 1000*l.* specific stock to B. and the legacies were paid and transferred before the revocation was discovered. A. invests his legacy, B. turns his into cash. The plaintiff contends that parties claiming under the new will can recover interest from B., who has not received any, and not from A., who has. Surely the question of recovering interest must depend on the particular facts, and if spent under a title authenticated by the Court it cannot in the absence of fraud be recovered. Again, the concealed fifth codicil did not appoint executors or make any change in that respect. The original probate was therefore merely voidable and not void, and acts done before revocation were valid: *Boxall* v. *Boxall.* (3)

[SWINFEN EADY J. If so, why cannot you keep the shares?]

I can so far as any legal claim of the plaintiff is concerned. The plaintiff can only follow them in equity, and would not be allowed intermediate profits.

Archibald Allen, for the executors and trustees.

(1) 5 Rep. 12a. (2) 1 Plowd. 275.
(3) 27 Ch. D. 220, 224.

SWINFEN EADY J.
1909
WEST, *In re.*
WEST *v.* ROBERTS

Hon. Frank Russell, K.C., in reply. The executors were not changed by the fifth codicil. Their title was derived from the will and codicils, and they could assent to legacies before or after either probate.

The plaintiff, the actual legatee, had an inchoate title to the legacy under the codicil before assent and even before probate, though no doubt he could not have established his title without probate. The executors' assent, whenever given, did not confer any new title. It merely shewed that the specific legacy was not wanted for payment of debts, and thus made the plaintiff's inchoate title absolute at law from the time of the testatrix's death.

Executors assent to a legacy, not to a legatee, and the fact that the present executors were mistaken as to the actual legatee and transferred the specific legacy to the wrong persons did not displace the plaintiff's inchoate title made absolute by that act of assent. The plaintiff can sue the transferees in detinue or trover and conversion for the legacy and its fruits.

Gittins v. *Steele* (1) and *Jervis* v. *Wolferstan* (2) were cases of a pecuniary legacy and residue respectively where no action at law lies.

In *Boxall* v. *Boxall* (3) the specific bequest, a leasehold house, was properly sold under the first grant in due course of administration.

If the executors in the present case had sold the shares under the first probate for payment of debts, it is possible that the sale could not have been upset against the purchasers, because the executors under either probate were bound to pay the debts. But what they did was to voluntarily transfer the property to the wrong persons. The executors under the second probate were neither bound nor authorized to do this, and the transfer cannot stand as to either capital or income. In the present case no change of executors was made by the fifth codicil, so that it is not at all clear that the question of the effect of successive probates really arises, the executors and the plaintiff really deriving their title from the will and codicils.

SWINFEN EADY J. (after stating the facts). The defendants do not dispute that the plaintiff is entitled to the shares bequeathed

(1) 1 Swans. 199. (2) L. R. 18 Eq. 18, 26.
(3) 27 Ch. D. 220, 224.

to him by the fifth codicil, which were erroneously but inadvertently transferred to the wrong persons, but they contend that the plaintiff is not entitled to the dividends which in the meantime they have received and retained for their own use.

It is exceedingly difficult to see any principle upon which the defendants, whilst conceding that they are not entitled to retain the shares given to their brother by the fifth codicil, are yet entitled to retain for their own use the dividends on those shares which were not really bequeathed to them at all. It is said that where a legatee has been ordered to refund either in respect of a pecuniary legacy or in respect of a share of residue, such refunding under the rule laid down in *Gittins* v. *Steele* (1) is without interest; but it appears to me that the reasoning has no application to a case of this kind, where the legacy is of specific shares, because upon the assent of the executors those shares vest in the legatee, and the assent, when given, has relation to the time of the testatrix's death. In the case of a specific legacy it is well established that immediately after the executors' assent the legacy vests in the legatee, and he can maintain an action at law in respect of it. If the plaintiff has a legal right to the shares as from the testatrix's death, it seems to me that he has also a legal right to the interest or dividends.

In Williams on Executors, 10th ed. p. 1108, it is said: "The assent of an executor shall have relation to the time of the testator's death: Hence, in the case of a devise of a term of years in tithes, in an advowson, or in a house or land, if after the testator's death, and before the executor's assent, tithes are set out, the church becomes void, or rent from the under-tenant becomes payable, the assent by relation shall perfect the legatee's title to these several interests."

In *Saunders' Case* (2) it is said that "if lessee for years devises his term to another, and makes his executors, and dies, the executors do waste, and afterwards assent to the devise, in that case, although between the executors and the devisee it hath relation, and the devisee is in by the devisor, yet an action of waste shall be maintainable against the executors in the tenuit."

It was rather suggested that the assent, if any, in this case

(1) 1 Swans. 199. (2) 5 Rep. 12b.

SWINFEN EADY J.

1909

WEST, *In re.* WEST *v.* ROBERTS.

under the second probate was subject to the intermediate improper application of the dividends, but I cannot accept that view. The legacy was assented to and the usual consequences must follow. The legatee became entitled to the legacy as from the testatrix's death.

With regard to the analogy between a pecuniary legacy or share of residue and a specific legacy, it is pointed out in Williams on Executors, 10th ed. pp. 1566, 1567, that no action at law lies against an executor for a general legacy or share of residue. "But the law is different with respect to specific legacies; for, after an assent by an executor to a specific legacy, he is clearly liable at law to an action by the legatee; because the interest in any specific thing bequeathed vests at law in the legatee, upon the assent of the executor." The executor can only assent to the legacy in favour of the legatee to whom it is given, not in favour of a stranger, and the only person to whom these shares that I have to deal with were given was the plaintiff.

I therefore determine that the plaintiff is entitled to the shares bequeathed to him, that he is entitled to these shares as from the testatrix's death, and that this bequest carries the intermediate income, including the right to recover that income from those who have received it.

Solicitors: *Charles Russell & Co.; Mayo, Elder & Co.; Kimbers & Boatman; Allen & Son.*

G. R. A.

In re ESPUELA LAND AND CATTLE COMPANY.

SWINFEN EADY J.

1909

April 6 ; *May* 8, 20.

Company—Preference Shares—Winding-up—Surplus Assets—Preference on Repayment of Capital—Right to further Share of Surplus—Distribution according to Nominal Value of Shares—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 133, *sub-ss.* 1, 10—*Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *s.* 186.

There is no general rule that where preference shareholders have a preference as to repayment of capital they can have no further share in surplus assets. The question depends on the construction of the memorandum and articles of association. But if these documents contain no provisions on the point, surplus assets must in a winding-up be divided amongst all the shareholders, ordinary and preference, in proportion to the nominal value of the shares.

A company incorporated in 1884 had an issued capital of 28,222 ordinary and 26,905 preference shares of 5*l.* each ; the preference shares were entitled to a cumulative preferential dividend of 10 per cent. out of "the divisible profits of the company in each year," and "a preferential right to be repaid the amount paid up thereon and interest out of the assets of the company if the company should be wound up." The company never paid any dividend except in the year 1905, when they paid 3 per cent. on the preference shares. In 1900 the capital of the company was reduced by writing down the ordinary shares to 1*s.* per share. In 1908 the company's assets were sold for a sum sufficient to pay all their liabilities, repay the capital of both classes of shares, and leave a large surplus :—

Held, that the surplus was not divisible profits of the company and the preference shareholders were not entitled to have it applied in payment of their cumulative dividends ; that they were entitled to have their capital repaid with interest at the rate of 5 per cent. per annum from the date of the winding-up order ; and that the surplus, after paying to the ordinary shareholders their reduced capital of 1*s.* per share, must be divided among the preference and ordinary shareholders in proportion to the nominal value of their shares.

THIS was a summons taken out by the liquidator in the voluntary liquidation of the Espuela Land and Cattle Company for the determination of certain questions arising in the liquidation as to the division of surplus assets between the preference and ordinary shareholders.

The company was incorporated in 1884, for the purchase and management of cattle ranches in Texas, with a capital of 500,000*l.* divided into 60,000 ordinary and 40,000 preference shares, all of 5*l.* each, the latter having a right to a cumulative preferential

SWINFEN EADY J.

1909

ESPUELA LAND AND CATTLE COMPANY, *In re.*

dividend of 10 per cent. and a preference in repayment of capital.

The clauses in the memorandum and articles of association as to the rights of the preference and ordinary shareholders are set out below. (1)

(1) *Memorandum of Association.*—Clause 5: "The capital of the company is 500,000*l.*, divided into 100,000 shares of 5*l.* each, of which 60,000 shares are ordinary shares and 40,000 shares (unless and until they or any part thereof shall be converted into ordinary shares) are preference shares, carrying a cumulative preferential dividend of 10*l.* per cent. per annum on the amount for the time being paid up thereon, and having also a preferential right to be repaid the amount paid up thereon and interest out of the assets of the company if the company shall be wound up; and the capital of the company may be increased by means of ordinary shares, or by means of any shares having preference or priority over the ordinary shares, but not having any preference or priority over the preference shares, or so as in any way to interfere or compete therewith."

Articles of Association.—Article 3: "The capital of the company is, as expressed in the memorandum of association, 500,000*l.*, divided into 100,000 shares of 5*l.* each, of which 40,000 shares are preference shares, and 60,000 shares are ordinary shares. The preference shares shall be entitled to a preferential dividend out of the divisible profits of the company in each year of 10 per cent. on the amount paid up thereon respectively before any dividend is paid upon the ordinary shares; and in case the divisible profits in any year shall be insufficient to admit of the payment of such dividend of 10 per cent. on the preference shares, such dividend shall be made good and paid out of the profits of the subsequent year or years before the ordinary shares shall be entitled to any dividend. Provided also that in case the company shall at any time be wound up the said preference shares shall be entitled to be paid out of the property and assets of the company the full amount of capital paid up thereon in preference and priority to and before any payment shall be made thereout in respect of the ordinary shares. The said preference shares or any part thereof may be exchanged for ordinary shares in manner hereinafter mentioned, and upon such exchange being effected the preference and priorities hereby given to the said preference shares shall, as to the shares so exchanged, cease and determine."

Article 34 gave the preference shareholders an option to convert their shares into ordinary shares at any time before March 1, 1890.

Article 87: "The directors may, with the sanction of the company in general meeting, declare dividends to be paid to the members, and may pay the dividends so declared out of the funds of the company which can be made available for the purpose. After making provision for the payment of dividends upon the preference shares in accordance with clause 3 of these articles, the balance of profits available for dividends in each year shall be divisible among the holders of the

Of the preference shares 26,905 and of the ordinary shares 28,222 had been issued and were all fully paid up. The company carried on business until the sale of its assets hereinafter mentioned, but the only dividend it had ever paid was one of 3 per cent. on the preference shares in 1905. In June, 1900, the capital of the company had been reduced to 201,450*l.* divided into 40,000 preference shares of 5*l.*, of which 26,905 had been issued, and 29,000 ordinary shares of 1*s.* each, of which 28,222 had been issued, the balance of 4*l.* 19*s.* on each ordinary share being written off as representing lost capital.

In December, 1906, the company agreed to sell all their assets for 576,947*l.*, and the purchase was completed in March, 1908. In September, 1908, the company went into voluntary liquidation. All the debts and debentures and other liabilities of the company were paid out of the purchase-money, and there remained a surplus more than sufficient to repay the capital of all the preference and ordinary shares. The liquidator took out this summons for the determination of the questions whether the preference shareholders were entitled in addition to the repayment of their capital to any and what part of the proceeds of sale under clause 5 of the memorandum of association, and, if so, between what dates and at what rate interest was to be reckoned; whether any and what part of such proceeds of sale could be claimed by the preference shareholders in respect of cumulative preferential dividends; whether the preference shareholders were entitled, after repayment of their capital and such interest and arrears of dividends as might be declared payable, to any and what further claim on the assets of the company, and in what events; or how any surplus assets that might remain after all the payments aforesaid and repayment to the ordinary shareholders of their paid-up capital ought to be distributed, and among whom. The surplus

ordinary shares, according to the number of shares and the amount paid up or deemed to be paid up thereon respectively; . . . . Provided, that in respect of ordinary shares, the dividend shall be restricted for the first year to a maximum of 5 per cent. and thereafter, until the 30th of November, 1890, shall be restricted to a maximum of 10 per cent. per annum."

Article 88: "No dividend shall be payable except out of the profits arising from the business of the company."

SWINFEN EADY J.

1909

ESPUELA LAND AND CATTLE COMPANY, *In re.*

assets, after paying all outside liabilities and repaying the capital on both classes of shares, was about 106,500*l.*

Ashton Cross, for the liquidator.

Gore-Browne, K.C., and *Clauson*, for the preference shareholders. The preference shareholders are entitled to their capital and a cumulative preferential dividend from the date of the payment for their shares. This would take the whole surplus, but under article 5 of the memorandum they have an absolute right to 10 per cent. out of the assets of the company independently of the question whether there are profits. If this contention is not correct, the surplus of the purchase-money over the liabilities, including repayment of capital, was profit arising out of the business of the company, and it ought all to be applied in paying our dividends: *Lubbock* v. *British Bank of South America* (1); *In re W. J. Hall & Co.* (2) There is nothing in article 3 of the articles of association to limit the preference shareholders' claim to declared dividends.

If the preference shareholders are not entitled to these dividends they are entitled to interest under clause 5 of the memorandum. That means interest from the time that the shares were subscribed. This is omitted in article 3, but the memorandum must prevail. A third view is that the capital of the preference and ordinary shares should be repaid and the surplus divided according to the amount paid up on their shares. It is contended that the preference shareholders are entitled only to their capital and interest and the ordinary shareholders take all the surplus, but there is nothing to deprive the preference shareholders of the right to share in the ultimate division of the assets of the company.

Younger, K.C., and *J. M. Paterson*, for the ordinary shareholders. As to the preference shareholders' claim for interest, the word "interest" either means dividends or interest in the ordinary sense. If it means dividends, it can only be paid out of profits arising from the business of the company, and there is no fund out of which it can be paid. The surplus purchase-money is not profits: *Birch* v. *Cropper*. (3) If it is interest in the ordinary

(1) [1892] 2 Ch. 198. (2) [1909] 1 Ch. 521.
(3) (1889) 14 App. Cas. 525.

sense, it can only be payable from the time when the capital is repayable, i.e., from the date of the winding-up: Buckley on Companies, 9th ed. p. 472; *In re W. J. Hall & Co.* (1)

The preference shareholders have no rights in the assets of the company beyond repayment of their capital with such interest as they are entitled to. Where a preference in repayment of capital is given, as a matter of principle the preference shareholders get no right to surplus assets beyond their capital, and in this case it may be plainly inferred from the memorandum and articles that that rule is to prevail. Clause 5 of the memorandum provides for the increase of capital by the issue of new shares "not having any preference or priority over the preference shares, or so as in any way to interfere or compete therewith." If the preference shares carried a right to a share in the ultimate division of assets, any issue of new shares must necessarily interfere or compete with them; so these words, which are repeated in article 3, negative the idea that the preference shares are to participate in the ultimate division of assets. The power given by article 34 to exchange preference for ordinary shares points in the same direction. It is intended to be a privilege, but it cannot be exercised after the date at which it becomes possible for the ordinary shares to receive a larger dividend than the preference shares. It would therefore be no advantage to the preference shareholders to make the exchange, unless by it they gained something in the ultimate division of capital.

On the authorities it is decided that a preference as to dividend does not affect the preference shareholders' right to capital one way or the other; but there is no case where shareholders who had a preference in repayment of capital were admitted to any further share in the capital. [They referred to *In re Wakefield Rolling Stock Co.* (2); *Griffith* v. *Paget* (3); *Birch* v. *Cropper* (4); the same case in the Court of Appeal under the name of *In re Bridgewater Navigation Co.* (5)]

Gore-Browne, K.C., in reply.

Cur. adv. vult.

(1) [1909] 1 Ch. 521.
(2) [1892] 3 Ch. 165.
(3) (1877) 6 Ch. D. 511.
(4) 14 App. Cas. 525.
(5) (1888) 39 Ch. D. 1.

SWINFEN EADY J.

1909

ESPUELA LAND AND CATTLE COMPANY, *In re.*

May 20. SWINFEN EADY J. (after stating the facts as above). It has been contended on behalf of the preference shareholders that they are entitled to receive their capital with all arrears of the preferential cumulative 10 per cent. dividend from the year 1884; that the excess of purchase-money, after discharging outside liabilities and repaying capital, is profit available for such dividends; and that any ultimate surplus remaining after repaying all capital and the preference dividends must be divided rateably among the preference and ordinary shareholders according to the nominal amount of their shares.

On the other hand the ordinary shareholders contended that the preference shareholders are only entitled to receive, in addition to their capital, interest at 5 per cent. per annum from the commencement of the winding-up to the date of repayment of their capital under a clause in the memorandum, and that subject to repaying the capital of the preference shareholders with such interest as last mentioned the whole surplus belongs to the ordinary shareholders.

If that contention is not well founded, then it was accepted that all the shareholders must take the surplus remaining after repayment of capital and such interest as aforesaid rateably between them, in proportion to the nominal amount of the shares. It was conceded that no point could be made of the capital having been reduced, and that the capital must now for all purposes be treated as the reduced amount. Clause 5 of the memorandum is in the following terms:— [His Lordship read that clause.]

The preference shareholders have therefore a preferential right to be repaid the amount paid up on their shares "and interest" if the company shall be wound up. That event has happened. Article 3 of the articles of association also provides for repayment of capital in a winding-up, but omits any reference to interest. Under clause 5 of the memorandum, however, the preference shareholders are in my judgment entitled to interest on their capital at 5 per cent. from the commencement of the winding-up until payment.

With regard to the claims of the preference shareholders to arrears of 10 per cent. dividends I must refer to articles 3, 87, and 88 of the articles of association. [His Lordship read those

articles, and continued: —] It will thus be seen that the preference shareholders are only entitled to dividends out of the divisible profits in each year arising from the business of the company. There were not any such profits, beyond the amount available for the one payment of dividend above mentioned, and at the date of the winding-up there was a debit balance on revenue account of 26,000*l*. I therefore determine that the preference shareholders are not entitled to be paid their arrears of dividends out of the proceeds of the realization of the company's capital assets.

There remains the question how the assets which remain after paying preference capital, interest thereon, and ordinary capital are to be distributed.

Mr. Younger, who claimed the whole surplus on behalf of the ordinary shareholders, contended that where priority of repayment on a winding-up is secured to the preference capital the preference shareholder is entitled to that repayment, but not to any further interest in the capital of the company, in the same manner as where a right to a fixed preferential dividend is secured to preference shareholders they take that fixed amount and nothing more, however large the revenue of the company may be.

This, however, is merely a question of the construction of the memorandum and articles. There is not any rule of law that shareholders having a fixed preferential dividend take that only. It is quite open to a company to distribute its revenue first in paying a fixed preferential dividend, then in paying a dividend of like amount to the ordinary shareholders, and then dividing any surplus revenue of any year rateably between the preference and ordinary shareholders. An instance of this is found in *Webb* v. *Earle*. (1) The documents embodying the constitution of the company determine how its revenue shall be distributed; and in like manner they determine how any surplus assets are to be divided. An instance of a provision that preference shares shall confer certain rights, "but shall not confer any further right to participate in profits or surplus assets," occurred in *In re South African Supply and Cold Storage Co.* (2) In the absence, however, of any provision to the contrary, the rights of the

(1) (1875) L. R. 20 Eq. 556. (2) [1904] 2 Ch. 268, 271.

SWINFEN EADY J.

1909

ESPUELA LAND AND CATTLE COMPANY, *In re.*

shareholders are equal. Where the shares are of unequal amounts the surplus assets must be distributed rateably according to the nominal amount of the shares, unless some provision to the contrary is to be found in the memorandum or articles: *In re Wakefield Rolling Stock Co.* (1); *Birch* v. *Cropper.* (2)

There were two provisions in the memorandum and articles upon which reliance was placed in the present case for the purpose of establishing that the preference shareholders were not to share in surplus assets—first, clause 5 of the memorandum, which states that "the capital of the company may be increased by means of ordinary shares, or by means of any shares having preference or priority over the ordinary shares, but not having any preference or priority over the preference shares, or so as in any way to interfere or compete therewith," and article 34, which is to the same effect. It was argued that this provision shewed that the preference shares were to receive back their capital, and no more; as, if this were not their position, any increase of capital would really enable the new shareholders to come into competition with the preferred shareholders: they would be entitled to be repaid their capital, before there were any surplus assets of which the preferred shareholders could claim a share, and, moreover, they would, by sharing rateably with the preferred shareholders in the surplus assets, be in effect competing with them in the distribution of such surplus.

I am of opinion that this construction is far-fetched and cannot be maintained. A preference dividend and priority for their capital—i.e., their subscribed capital—is secured to the preferred shareholders, and it is this preference and this priority which are not to be interfered or competed with. An issue of further capital, postponed to the preference shares both for dividend and for capital repayment, is allowed; and such issue will not interfere or compete with the preference or priority of the preferred shares within the meaning of the memorandum and articles, merely because, after the capital of the preferred shares has been repaid, such new capital must be repaid before there are any surplus assets for division, or because such new capital will rank rateably with the preferred shares in the distribution of any further assets.

(1) [1892] 3 Ch. 165. (2) 14 App. Cas. 525.

The other provision upon which reliance was placed by the preference shareholders was the clause in the memorandum and articles enabling preference shares to be converted into ordinary shares at any time before March 1, 1890, and during the period when (by article 87) the dividends on the ordinary shares were restricted to a maximum of 10 per cent. But I fail to see that this provision throws any light upon the position of the preference shareholders on a winding-up.

I therefore determine that the surplus assets must be distributed rateably between the preferred and ordinary shares, according to the nominal amount of their shares, each preference share being entitled to one hundred times the amount attributable to each ordinary share, as the nominal amounts of the shares are in that proportion.

Solicitors: *Flux, Thompson & Quarrell; Edell & Gordon.*

J. R. B.

In re KENT COUNTY GAS LIGHT AND COKE COMPANY, LIMITED.

[00416 of 1906.]

Bankruptcy—Undischarged Bankrupts—After-acquired Property—Purchase of Real Estate as Partners—Sale to a Company—Intervention of Trustees in Bankruptcy—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 44, 54—*Partnership Act*, 1890 (53 & 54 *Vict. c.* 39), *s.* 22.

The principle of *Cohen* v. *Mitchell*, (1890) 25 Q. B. D. 262, applies to after-acquired real estate which undischarged bankrupts purchase as partners for partnership purposes and sell and convey to a bona fide purchaser for value before their respective trustees in bankruptcy intervene.

Adjourned Summons.

In February, 1902, W. Darby and H. Gyde agreed to enter into partnership as stock and share dealers as from March 1, 1902. W. Darby was to take an office in London at about 50*l.* a year and to provide 50*l.* cash as the capital of the business, and H. Gyde was to furnish the office. The profits of the business were to be equally divided between the partners, and the partnership was to terminate by either partner giving a three months'

NEVILLE J. written notice to the other from any date after the first twelve months. The terms of this partnership were modified in November, 1903, as follows: That as and from December 1, 1903, one third of the profits were to go to W. Darby and two thirds thereof to H. Gyde, and in the event of the sale of the business the purchase price was to be allocated in the same proportions. There was no evidence that this partnership had at any time been determined.

1909

KENT COUNTY GAS LIGHT AND COKE COMPANY, LIMITED, *In re.*

By deed dated March 13, 1906, and made between the Goudhurst Gas Company, Limited (as freeholders), of the first part, certain persons and companies (being lessees and incumbrancers) of the second, third, fourth, and fifth parts respectively, and W. Darby and H. Gyde, described as "trading as Darby & Co. of 5 Lothbury in the city of London," of the sixth part, in consideration of 2550*l.* paid by W. Darby and H. Gyde in manner therein mentioned, certain freehold gas works situate at Goudhurst, in the county of Kent, with all fixtures and mains were conveyed free from incumbrances unto and to the use of W. Darby and H. Gyde in fee simple. On April 17, 1906, W. Darby and H. Gyde, under the name and description of "F. C. Lawson & Co. of Cranbrook in the county of Kent, gas works proprietors," entered into a provisional agreement with one Archer, as trustee for an intended company to be called the Kent County Gas Light and Coke Company, for the sale to the company when formed of their freehold gas works at Goudhurst for the sum of 21,800*l.* On May 2, 1906, the company was by the direction of W. Darby and H. Gyde registered under the Companies Acts, 1862 to 1900, with a nominal capital of 50,000*l.*, and its principal object was the acquisition of the Goudhurst gas works with all fixtures and mains. A considerable number of shares were applied for by the public, and the company went to allotment. On May 31, 1906, the company entered into the usual adoptive agreement with W. Darby and H. Gyde, who were therein described as "both of Cranbrook in the county of Kent gas works proprietors carrying on business under the style or firm of F. C. Lawson & Co."; and by deed dated June 11, 1906, and made between W. Darby and H. Gyde, "formerly trading as Darby & Co. of No. 5 Lothbury in the

city of London but now carrying on the business of gas works proprietors at Cranbrook in the county of Kent under the style or firm of "F. C. Lawson & Co.," of the one part, and the company of the other part, W. Darby and H. Gyde in consideration of 21,800*l.* and as beneficial owners conveyed the Goudhurst gas works with all fixtures and mains to the company in fee simple. The whole of this purchase-money was paid in cash.

On January 20, 1907, an order was made for the compulsory winding up of the company, and the Senior Official Receiver in Companies' Liquidation became the liquidator of the company. In October, 1907, the liquidator sold the gas works by public auction for 1250*l.*, and in November following they were duly conveyed to the purchaser. Soon afterwards it was discovered that both W. Darby and H. Gyde were undischarged bankrupts, H. Gyde (whose real name was H. Bernard) having been adjudicated bankrupt in London in April, 1900, and W. Darby having been adjudicated bankrupt at Cardiff in September, 1894. Thereupon the trustees in their respective bankruptcies claimed that the freehold portion of the gas works vested in them as after-acquired real estate of the two bankrupts immediately on the execution of the conveyance of March 13, 1906, and still remained vested in them, in the proportions in which it would have originally belonged to W. Darby and H. Gyde, otherwise Bernard, if they had not been undischarged bankrupts.

This summons was then taken out by the liquidator to determine whether the freehold portion of the gas works vested in the company under conveyance of June 11, 1906, having regard to the fact that both Darby and Gyde were undischarged bankrupts at the time when they acquired the property on March 13, 1906, or whether the same freeholds vested in the two trustees in bankruptcy on the execution of the conveyance of March 13, 1906, and still remained vested in them. It was arranged between the trustees and the liquidator that, whatever the decision of the Court might be, the title of the purchaser from the liquidator should not be impeached; but that, if the claim of the trustees should be held to be well founded, compensation should be made to them out of the assets of the company.

NEVILLE J.
1909
KENT COUNTY GAS LIGHT AND COKE COMPANY, LIMITED, *In re.*

Fischer Williams, for the liquidator. The question is whether or not the doctrine of *Cohen* v. *Mitchell* (1) applies to this case, i.e., whether the sale of these freeholds by the bankrupts to the company before the intervention of their trustees in bankruptcy was valid. By s. 54 of the Bankruptcy Act, 1883, the property of a bankrupt vests in his trustee, and by s. 44 of the Act the "property of a bankrupt" includes all such property as may be acquired by him before his discharge. It was decided, however, in *Cohen* v. *Mitchell* (2) that until the trustee intervenes all transactions by an undischarged bankrupt with any person dealing with him bona fide and for value in respect of his after-acquired personal estate are valid against the trustee, and the doctrine has been extended to leaseholds: *In re Clayton and Barclay's Contract* (3); but it does not apply to real estate: *In re New Land Development Association and Gray.* (4) All the authorities are considered in *Official Receiver* v. *Cooke.* (5) Where land, however, is held as partnership property, the Partnership Act, 1890, s. 22, provides that it is to be treated, as between the partners, as personal estate; and it is subject to probate duty: *Attorney-General* v. *Hubbuck.* (6) A trustee in bankruptcy can only take what a bankrupt can give him, and in a case of real estate forming partnership property the share of a bankrupt partner is personal estate. The nearest case to the present is *Darby* v. *Darby.* (7) The bankrupts bought this land "trading as Darby & Co." and it was conveyed to them as such, and it was conveyed by them as partners to the company; and it is submitted that the inference from the deed of March 13, 1906, is that they paid for it out of their partnership money. If that is so, then this land was personal estate in the hands of the bankrupts and passed as such to their respective trustees in bankruptcy, because each partner could only give his trustee his share in the partnership assets. Therefore the intervention of the trustees as against the liquidator of the company is now too late.

J. G. Wood, for the trustees. I do not dispute the law. The

(1) 25 Q. B. D. 262.
(2) Ibid. 269.
(3) [1895] 2 Ch. 212.
(4) [1892] 2 Ch. 138.
(5) [1906] 2 Ch. 661.
(6) (1884) 13 Q. B. D. 275.
(7) (1856) 3 Drew. 495, 503.

real point is whether these freeholds were ever partnership property. There is no evidence to shew that these two bankrupts ever had any money in their hands as partnership assets beyond the 50*l.* originally contributed by them, and there is no evidence of any agreement between them to buy these freeholds and hold them as part of their partnership assets. If so, the Partnership Act does not apply. Their business was that of stock and share dealers, and it cannot be said that the purchase of real estate is part of such a business. It is submitted that the true inference from the deeds of 1906 is that the bankrupts acting under various names were promoters of the company and bought these freeholds as co-owners for their scheme and simply held them as co-owners for a few days until conveyed to the company. *In re Wilson* (1) is directly in point, and *Cohen* v. *Mitchell* (2) does not apply. These freeholds clearly formed no part of the partnership assets of the old partnership of 1902.

NEVILLE J. This is a peculiar case. Two undischarged bankrupts purchased certain real estate which they shortly afterwards sold to a company, and subsequently the company, or rather its liquidator, in the course of the company's liquidation, sold the real estate to a purchaser for 1250*l.*, and this sum is still in the hands of the liquidator. It is agreed that the title of this ultimate purchaser is not to be disturbed; but, as between the trustees in bankruptcy of the two undischarged bankrupts and the liquidator of the company, the question is whether the effect of the conveyance of this real estate to the undischarged bankrupts in March, 1906, was to vest the property immediately in their trustees as after-acquired real estate of the bankrupts, so that nothing passed by the subsequent conveyance by the bankrupts to the company; or whether the property passed by the conveyance to the company and through them to the ultimate purchaser.

Now under ss. 44 and 54 of the Bankruptcy Act, 1883, the property of a bankrupt divisible amongst his creditors and which passes to his trustee includes (amongst other things) every description of property real or personal which "may be acquired

(1) [1893] 2 Ch. 340. (2) 25 Q. B. D. 262.

NEVILLE J. 1909 KENT COUNTY GAS LIGHT AND COKE COMPANY, LIMITED, *In re.*

by or devolve on him before his discharge," but it has been held by the Court of Appeal in *Cohen* v. *Mitchell* (1) that, until the trustee intervenes, all transactions by an undischarged bankrupt with any person dealing with him bona fide and for value in respect of his after-acquired property, whether with or without knowledge of the bankruptcy, are valid against the trustee; but that proposition has not been extended to real estate: *In re New Land Development Association and Gray.* (2) It has been decided, however, that it applies to leaseholds: *In re Clayton and Barclay's Contract.* (3) Now the question is whether the principle of *Cohen* v. *Mitchell* (1) applies to the present case. How does the matter stand? The two trustees in bankruptcy claim this property as real estate, and they have to shew that on the execution of the conveyance of March 13, 1906, the property conveyed by the Goudhurst Company to the bankrupts passed through the bankrupts as conduit pipes to their respective trustees as real estate. I think one must take it, however, that the property was conveyed by that deed to the bankrupts as partners, for they are described in it as "trading as Darby & Co. of 5 Lothbury in the city of London," and then the conveyance is to them as joint tenants in fee simple. In my opinion that is good prima facie evidence that the bankrupts were buying the property as partners for partnership purposes. Now, if the property was conveyed to the bankrupts as partners, what interest vested in their respective trustees in bankruptcy? First of all the partners took the property as joint tenants in fee simple for the partnership, and the legal estate of the property was vested in them as joint tenants in trust for the partnership. But the real interest of each bankrupt was his share in the partnership assets, which included this real estate, but was undoubtedly personal estate, and that share was the interest which vested in his trustee in bankruptcy. The result is that, in my opinion, the principle of *Cohen* v. *Mitchell* (1) applies, and that this real estate never vested in the trustees in bankruptcy, the bankrupts having parted with their partnership property to the company before their trustees in bankruptcy intervened. I hold, therefore, that the

(1) 25 Q. B. D. 262. (2) [1892] 2 Ch. 138.
(3) [1895] 2 Ch. 212.

claim of the liquidator is a good one. There will be a declaration that the freehold property in question was validly conveyed by the bankrupts to the company.

NEVILLE J. 1909 KENT COUNTY GAS LIGHT AND COKE COMPANY, LIMITED, *In re.*

Solicitors: *Corbould-Ellis & Mitchell; Tarry, Sherlock & King.*

H. L. F.

In re WAGSTAFF'S SETTLED ESTATES.

NEVILLE J. 1909 *May* 19.

[1908 W. 124.]

Settled Land—"Trust or Direction for Sale"—Trust for Sale "only at the request of my wife"—Tenant for Life—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), s. 63—*Settled Land Act*, 1884 (47 & 48 *Vict. c.* 18), *ss.* 6, 7.

The fact that a trust for sale cannot be exercised without the consent of the tenant for life does not prevent its being a trust or direction for sale within the meaning of s. 63 of the Settled Land Act, 1882.

James Poole Wagstaff by his will dated March 31, 1897, after giving certain legacies and an annuity of 100*l.*, gave all his residuary real and personal estate of every description, including leaseholds, to three trustees (one of whom was his wife) upon trust that they should "at such time or times as they shall think proper (but as to real estate only at the special request or with the consent in writing of my said wife) sell my said real and leasehold estates" and sell and convert his personal estate, and out of the proceeds should pay his debts and funeral and testamentary expenses and invest the residue as therein mentioned, and proceeded: "And I do hereby declare that my said trustees do and shall by and out of the dividends interest and annual produce of all and singular the several trust moneys stocks funds and securities forming part of my said general residuary personal estate or purchased with moneys arising therefrom or from the sale of my real and leasehold estates or from the rents of such part thereof as shall be unsold (all of which moneys stocks funds or securities real and leasehold estates and premises are hereinafter called or referred to as 'the residuary trust estate') pay and satisfy the annuity hereinbefore given and do and shall pay the residue or surplus of the said dividends interest and annual produce to or authorise or permit

NEVILLE J. 1909

WAGSTAFF'S SETTLED ESTATES, *In re.*

the same to be received by my said wife during her life if she shall so long continue my widow for her own use and benefit." The testator then directed that after the death or second marriage of his said wife the residuary trust funds should be held upon the trusts therein mentioned, the ultimate trust being in favour of the testator's next of kin, and proceeded: "I declare that my trustees may postpone the sale and conversion of my real and personal estate or any part thereof for so long as they shall in their uncontrolled discretion think fit notwithstanding that the property the sale or conversion whereof shall be so postponed may be of leasehold tenure or may be otherwise of a perishable or wearing out nature And particularly I desire (but without limiting in any way the discretion of my trustees) that my real estate shall remain unsold if convenient until the time shall arrive for the division or disposal of the residuary trust estate." The will also contained a provision that during any postponement of the sale or conversion of the estate the net income was to be applied as if it were income arising from the moneys produced by such sale or conversion. The trustees were also executors.

The testator died on September 2, 1903.

This summons was taken out by the testator's widow for a declaration that on the true construction of the will she was for the purposes of the Settled Land Acts the tenant for life of the lands settled by the said will, or in the alternative for an order that she might exercise the powers conferred by s. 63 of the Settled Land Act, 1882, on her as the person under that section deemed to be the tenant for life thereof.

Jenkins, K.C., and *J. G. Wood*, for the widow. The land in this case is not subject to a trust or direction for sale within s. 63 of the Settled Land Act, 1882, and the widow can exercise the powers of a tenant for life without requiring the leave of the Court under the Settled Land Act, 1884. What is in form a trust for sale may be reduced to a mere power by the context: *In re Hotchkys.* (1) In this case the testator clearly intended to give the trustees a power only, and not to declare an absolute trust, for he directs a sale only when the

(1) (1886) 32 Ch. D. 408.

trustees think fit; no sale is to take place without the widow's consent. In defining his general residuary estate the testator includes rent of real estate unsold, and he expresses a desire that the land shall not be sold during his wife's life. The words of s. 63 require a present trust for sale without any conditions: *In re Horne's Settled Estate* (1); *In re Goodall's Settlement.* (2)

Peterson, K.C., and *H. T. Methold*, for a remainderman. In *In re Horne's Settled Estate* (1) there was a direction that there should be no sale for twenty-one years. It was impossible to hold that the land during those years was subject to a trust for sale. *In re Hotchkys* (3) was decided on the ground that the gift over to A., his heirs and assigns, could not be reconciled with an absolute conversion. *In re Childs' Settlement* (4) is a direct authority that a trust for sale with the consent of the tenant for life is within s. 63, and there are two Irish cases to the same effect: *In re Ievers' Settlements* (5) and *In re Tuthill.* (6)

Stamp, for another remainderman.

Bradley Dyne, for the trustees.

J. G. Wood, in reply.

NEVILLE J. (after stating the facts and reading the parts of the will set out above). The question is whether that will contains "a trust or direction for sale" within the meaning of s. 63 of the Settled Land Act, 1882, and the real point is whether the fact that the consent of the tenant for life is required to any sale prevents the provision as to sale in the will from being such a trust or direction and reduces it to a power. I do not think much importance attaches to the fact that in the definition of "residuary trust funds" the testator includes the rents of unsold real estate, because there was a power to postpone the sale of real estate, and there might be real estate in existence at any time though there was a trust for sale. The will contains the peculiar addition of an expression of the testator's desire that his real estate should remain unsold until the time should arise for the division or disposal of the residuary trust estate. I thought at first that considerable importance

(1) (1888) 39 Ch. D. 84.
(2) [1909] 1 Ch. 440.
(3) 32 Ch. D. 408.
(4) [1907] 2 Ch. 348.
(5) [1904] 1 I. R. 492.
(6) [1907] 1 I. R. 305.

NEVILLE J. 1909 WAGSTAFF'S SETTLED ESTATES, *In re.*

attached to those words, because they might amount to an actual postponement of the trust for sale till the death of the widow. But on further consideration I do not think the words can have that meaning attached to them. The testator says that the discretion of the trustees is not to be interfered with, and I think the words indicate only a desire or anticipation that the trustees will carry out the trust by letting the estate remain unsold during the tenancy for life. That being so, I come back to the question whether the necessity for the consent of the tenant for life prevents what on the face of it is a trust for sale from being in fact "a trust or direction for sale" within the section. In my opinion it does not. First of all, apart from the conclusion I should arrive at without the assistance of authority, I have the case of *In re Childs' Settlement* (1), before Kekewich J., in which the point was not actually argued, but it was obviously before the minds of the parties concerned in the case. It was there decided that a trust for sale subject to a consent or request was within the section. The words there were "at the request in writing of Anna Macrae." In addition to that, I have had cases cited in the Irish Reports in which the same view has been adopted. On the other hand, there are certain cases which have been cited with which I must deal. The first is *In re Hotchkys*. (2) That was a case which went before the Court of Appeal. In that case there was a question of whether or not there was a conversion, and whether the words that I am going to refer to created a trust or only a power. The words were "Upon trust at their discretion to sell or dispose of all such parts thereof as shall not consist of money" and to pay debts, &c., and then invest the residue, "and shall stand possessed of such real and personal estate money and securities upon trust to pay the rents interest dividends and annual produce thereof" to E. T. for life. It was held in that case, as I understand the decision, that "at their discretion" meant that they had the discretion whether they would sell or not; it did not refer to the time or mode of selling, but referred to the sale itself. I think the decision was based largely upon the fact that in the gift over the words "real and personal estate and the securities on

(1) [1907] 2 Ch. 348. (2) 32 Ch. D. 408.

which the same may be invested" were used, and the gift was to C. "his heirs executors administrators and assigns according to the nature and quality thereof," which indicated the possibility of the estate remaining real estate. Another case that was cited was *In re Horne's Settled Estate.* (1) In that case there was a direction that the testator's estate should not be sold until the expiration of twenty-one years from the date of his will, and it was held by North J. that that was not a trust or direction for sale within the Act. That view was accepted, or not dissented from, by the Court of Appeal, but they decided the matter on another point, that in that case the appellants were not tenants for life within the meaning of the section. I think that the postponement for twenty-one years is quite a different thing from the ordinary trust for sale with the consent of the tenant for life, and I do not think that case can be treated as a decision upon the point. Then we have *In re Goodall's Settlement* (2), a decision of Swinfen Eady J. In that case the provision was peculiar. First of all the words were "should at the request in writing of the husband during his life, and after his death in the discretion of the trustees, sell," but in the judgment insistence is laid upon a provision contained in the settlement that the husband, who had a power of appointment, might declare in any document exercising the power of appointment that the sale should not take place, and the learned judge held that in a case where a sale may never take place, and the trustees may never have the right to sell owing to an overriding power vested in some one else, there is not a trust or direction for sale under the section. It seems to me that that again is a different case from the case which I have to decide, and in my opinion this is really to all intents and purposes a simple case of a trust for sale with consent. I think that the words "with the consent of A." added to a simple trust for sale do not prevent its being a "trust or direction for sale" within the section.

Solicitors: *Tippetts, for Coles, Sons & Tilburn, Eastbourne; W. T. Coventon; R. W. Seward; Stow, Preston & Lyttelton.*

(1) 39 Ch. D. 84. (2) [1909] 1 Ch. 440.

J. R. B.

PARKER J.
1909
March 9, 18, 19, 23.

In re HARRIS.
LEACROFT *v.* HARRIS.

[1908 H. 4049.]

Election—Bequest by Married Woman of Husband's Property to a Third Person—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-s.* 1; *s.* 5.

If, having regard to the Married Women's Property Act, 1882, the will of a married woman would have passed property if it had been her own at the date of the will, her husband is in respect of that property, if it belongs to him, even by acquisition in her right, and is clearly identified, put to election where the will also confers benefits on him.

Where the gift away from the husband is of all the wife's property of a certain description, it is more difficult to shew a case of election even where the wife has little or no property of that description.

Observations on *Rich* v. *Cockell*, (1802) 9 Ves. 369.

Louisa Sophia Harris, wife of Walter Noel Harris, by her will dated October 27, 1903, appointed two persons as executors and trustees thereof, and directed that, after payment of all her just and lawful debts and funeral and testamentary expenses, her means and estate should be divided as follows: First she gave certain pecuniary legacies all free of legacy duty and payable as at the date of her death. Secondly she gave "my gold watch formerly belonging to my late great aunt, Louisa Jane Greaves, and my pink topaz ornaments, formerly belonging to my late mother, and also all my lace and wearing apparel to my cousin Emily Currey wife of Percy Currey and the remainder of all my jewellery to the said Alice Leacroft . . . . to be retained by her until her son (who is also my godson) Ronald John Ranulph Leacroft shall marry and on that event to be delivered to him." Thirdly she gave "my whole gold and silver plate and plated articles, including my Sheffield plate, to Mrs. Mary Catherine Murray Renshaw wife of Edward Renshaw of Woodlands near Macclesfield absolutely as her sole and separate property, free from the control and engagements of her present or any future husband." Fourthly she gave "my whole linen, china, pictures and prints to the said Ronald John Ranulph Leacroft

absolutely." Fifthly she gave "my whole household furniture, books, musical instruments and other articles effects and implements belonging to me to the said Walter Noel Harris for his life" and afterwards to R. J. R. Leacroft; and after giving certain real property (subject to certain life interests) on trust in favour of R. J. R. Leacroft, the testatrix devised and bequeathed the residue of her real and personal estate to her trustees upon trust out of the rents and profits to pay an annuity to W. N. Harris, her husband.

The testatrix died on January 17, 1908, and her will was proved by Alice Leacroft, one of the executors, on July 25, 1908.

The testatrix was married to Walter Noel Harris in 1873, and he survived her.

The gold watch referred to in the will belonged to her husband, who had acquired it in her right. The topaz ornaments were acquired by her as her separate property in 1893. She had no lace, but she had some articles which would pass under a gift of lace. She had also wearing apparel and certain articles which would pass under a gift of jewellery. She had no gold or Sheffield plate, or plate of any description, except possibly a goblet, sugar tongs, and table ornaments, but her husband had acquired in her right a considerable amount of silver plate and Sheffield plate, but no gold plate. He had certain articles of plate which had not been acquired in her right, but no gold plate. She had a small quantity of china, a considerable number of pictures and prints, and very little, if any, linen which she could dispose of. She had some furniture and a few books and a piano. Her husband had acquired in her right a number of valuable books and pictures, but not any musical instrument. The property out of which the annuity was given belonged to the testatrix for her separate use. Under the above circumstances the executrix of the testatrix took out an originating summons, to which W. N. Harris, Mary Catherine Murray Renshaw, and Ronald John Ranulph Leacroft were defendants, raising, amongst other questions, the question whether W. N. Harris was put to his election whether he would take the annuity or such property of his as the testatrix had purported to give to other persons by her will.

PARKER J.
1909
HARRIS, *In re.* LEACROFT *v.* HARRIS.

Beebee, for the summons.

Romer, *K.C.*, and *Lyttelton Chubb*, for W. N. Harris. The husband is not put to his election. In order to raise a case for election under a will there must be on the face of the will a disposition on the part of the testator of something belonging to a person who takes an interest under the will. Where a testator has transferred stock into the names of himself and his wife, a general gift of his stock, or even a gift of stock exactly the same in amount as that so transferred, will not put the wife to her election: *Dummer* v. *Pitcher* (1); Theobald on Wills, 7th ed. p. 107. To raise a case for election there must be personal competency on the part of the author of the attempted disposition. Formerly where a will was insufficiently executed to pass realty the heir was not put to his election: Jarman on Wills, 5th ed. vol. i. pp. 418, 419. Where a testatrix was incompetent to dispose of property on account of coverture no case of election arose: *Rich* v. *Cockell* (2); *In re De Burgh Lawson*. (3) Here the testatrix had no separate property of which she could dispose.

Roope Reeve, for the second defendant. We submit that the husband was put to his election. By s. 5 of the Married Women's Property Act, 1882, all the property of the testatrix was held by her as her separate property and she was competent to make a will. [He also referred to Lush on Husband and Wife, 2nd ed. pp. 32, 45.]

Martelli, *K.C.*, and *Dighton Pollock*, for the infant. We agree that to raise a case of election a gift by will must be shewn and knowledge must also be shewn. Under s. 1 of the Married Women's Property Act, 1882, the testatrix was competent to dispose of her property by will. Her will would be inoperative if she had no separate property. The Probate Rules, 1887, rr. 15, 18, as to wills of married women, do not affect beneficial interests, but the will is a document of which the Court can take notice: *Smart* v. *Tranter* (4); Wolstenholme's Conveyancing and Settled Land Acts, 9th ed. p. 310. The husband's obligation to elect is not confined to the gold watch, but extends to all the classes of things which she regarded as

(1) (1833) 2 My. & K. 262.
(2) 9 Ves. 369.
(3) (1885) 34 W. R. 39.
(4) (1890) 43 Ch. D. 587.

her property, and some of which he had acquired in right of his wife.

Romer, K.C., in reply. It is clear, on the authority of *Rich* v. *Cockell* (1) and *In re De Burgh Lawson* (2), that a married woman's will cannot raise a case of election. The law as so laid down has not been altered by the Married Women's Property Act, 1882. Sect. 1 of that Act must be construed with and is limited to property coming within s. 5: *In re Cuno.* (3) The powers of a married woman were not increased in this respect by the Act of 1882, and the Married Women's Property Act, 1893, s. 3, only applies s. 24 of the Wills Act, 1837, to a married woman's will. The form of probate of a married woman's will is immaterial.

PARKER J. The first question which arises in this case is whether the will of Mrs. Louisa Sophia Harris raises any case of election. To raise a case of election under a will it must, I think, be reasonably clear from the will itself, having regard only to the circumstances under which it was made, and excluding evidence of intention, that the testator intended to dispose of property which in fact was not his own. Whether or not he knew it was not his own is, it seems to me, immaterial. Where the property is sufficiently identified on the face of the will no difficulty arises. Where the property is only described in terms more or less general a case of election can seldom be raised, and even where at the date of the will the testator had no property of his own falling within the general description the gift may, at any rate since the Wills Act, 1837, have been meant to pass any after-acquired property falling within the general description. It is to be observed that even before the Wills Act a mere general devise of real estate was insufficient to raise a case of election, though the testator had no real estate of his own when he made the will. This rule apparently did not apply when to the general devise was added some particular description, for example the testator's estate in a particular locality. I am not sure that the rule was ever quite the same with regard to

(1) 9 Ves. 369. (2) 34 W. R. 39.
(3) (1889) 43 Ch. D. 12.

PARKER J. 1909 HARRIS, *In re.* LEACROFT *v.* HARRIS.

personal property, but both before and after the Wills Act the less general the description the easier it was to decide that a case of election arose. *Dummer* v. *Pitcher* (1) is a good instance of the difficulty of raising a case of election by the use of general words of description only.

In this particular case the testatrix bequeathed her gold watch, which formerly belonged to her great aunt Louisa Jane Greaves, and her pink topaz ornaments, formerly belonging to her late mother, and also all her lace and wearing apparel to her cousin Emily Currey, wife of Percy Currey, and the remainder of all her jewellery to Alice Leacroft, "to be retained by her until her son (who is also my godson) Ronald John Ranulph Leacroft shall marry and on that event to be delivered to him." The gold watch referred to in this gift was not the property of the testatrix. On the other hand, the topaz ornaments appear to have been her separate property, having come to her in the year 1893. The gold watch belonged to her husband, who had acquired it in her right, though from what source does not appear; and, there being a particular description, it is reasonably clear what article the testatrix intended to dispose of, and but for the question I have hereafter to mention, namely, as to whether the will of a married woman can raise a case of election at all, it is clear that a case of election would arise, there being a gift in a later part of the will of an annuity to the husband, under which I gather it is admitted that he took something, though the exact amount may be in dispute.

As the evidence at first stood it appeared that the testatrix had no lace. As the evidence now stands (a supplementary affidavit having been made by the husband) it appears that she had in fact some, I gather, trifling articles which would pass by the word "lace," but were of no great value. She had, of course, wearing apparel, and it appears to me that when a lady leaves her wearing apparel specifically the gift is more likely to refer to any wearing apparel she may have at her death than to any particular wearing apparel which she has at the date when she makes her will. Even if she had had no lace, I could not, I think, draw from that fact the inference that she meant to

(1) 2 My. & K. 262.

dispose of any articles belonging to her husband, even though her husband had in fact in her right acquired some valuable lace under the will of one of the testatrix's relations, Louisa Jane Greaves.

With regard to the bequest of the remainder of her jewellery, it similarly appeared, on the evidence originally before me, that the lady had no jewellery of her own other, perhaps, than the pink topaz ornaments; but a supplementary affidavit has been made by the husband which points to the fact that, though she had no jewellery in any quantity, she did, as one would very naturally suppose, have certain articles of her own which would pass by the term jewellery, and which she had acquired herself since the Married Women's Property Act, 1882. Even if she had had no jewellery, I doubt whether it would have been possible to raise any inference that she intended to dispose of jewellery which her husband had acquired in her right. I take it that it is more reasonable to suppose that she intended to pass by that gift such articles of jewellery as she might have at her death and over which at her death she had any disposing power. Even in that case, therefore, I doubt whether there could arise any case of election from the words of the will; and, of course, it is an a fortiori case if, as a matter of fact, at the date of the will she did have jewellery capable of passing by the gift. At any rate, on the evidence as it at present stands, it appears to me to be impossible to say that it is reasonably clear on the face of the will that she intended to raise any case of election or intended by the gift in question to dispose of any property which was not her own other than the gift of the gold watch.

Next follows a bequest of the testatrix's whole gold and silver plate and plated articles, including her Sheffield plate, to Mrs. Mary Renshaw, wife of Edward Renshaw, of Woodlands, near Macclesfield, absolutely as her sole and separate property free from the control and engagements of her present or any future husband. The testatrix had no plate of any description except possibly a goblet, sugar tongs, and table ornaments mentioned in the last affidavit of the husband. She certainly had no Sheffield plate or gold plate. On the other hand, her husband had acquired in her right under the will of Louisa Jane Greaves,

PARKER J. 1909 HARRIS, *In re.* LEACROFT *v.* HARRIS.

the lady I have already mentioned, certainly not any gold plate, but a considerable amount of silver plate, including certain Sheffield plate, or plate which is sometimes described as Sheffield plate. I think also that it is shewn that the husband had other articles of plate of his own which he had not acquired in right of his wife, but no gold plate.

Now, if I were to ask myself what the testatrix meant when she put the bequest in her will disposing of her gold plate, the only answer possible is that either she meant gold plate which she might thereafter acquire, or that she was making a mistake of fact, thinking she had plate of that description, whereas in fact she had none ; and I think that it is clear she may also have thought she had silver plate or Sheffield plate of her own, or may have been in the same way looking forward to possibly acquiring some articles of that description before her death, and it does not seem to me that I can say it is reasonably clear even on this bequest (which is perhaps a more difficult one than the other) that she intended to dispose of any definite articles, or any definite class of articles, which were not her own to dispose of. I am told that the plate which came to her husband in her right under the will of Louisa Jane Greaves was family plate formerly belonging to members of her family and marked with the family crest. I am asked to draw from these facts the inference that she intended to dispose of her family plate. Of course if she had used the words "family plate" there might have been no difficulty in the matter ; but she has framed the bequest in such a way that it passed any plate she had at the date of the will, or acquired after the date of the will, whether it was or was not family plate; and under these circumstances, whatever may be the probabilities of the case (if one had to speculate on the probabilities), it seems to me that it is not sufficiently clear on the face of the will that she was intending to dispose of any property not her own so as to raise a case of election.

The next bequest in the will is the bequest of "my whole linen, china, pictures and prints to Ronald John Ranulph Leacroft absolutely." In this case there is still less difficulty, for it appears that the lady had at the date of her will a quite trifling amount of china. She had not any substantial amount of china,

but she had a considerable amount of pictures and prints. With regard to linen, she had very little which she could dispose of, if she had any; but it being a general bequest, and there being both pictures and prints which could pass under it, I do not think I could draw any inference from the use of the words "linen and china" that she was really intending to dispose of any property which did not belong to her. These words are more naturally inserted like other general words to carry property of that nature if she had any of that nature.

The last gift is really in pari materia, for the lady disposes of her household furniture, books, musical instruments, and other articles. It appears she had some furniture and very few books. She had a piano and no other musical instrument. She had, of course, personalty which would pass under the description of articles belonging to her. It is true the husband acquired under the will of Louisa Jane Greaves in her right a quantity of valuable books and pictures and other similar chattels, but he had acquired apparently under that will no musical instruments. Taking these facts into consideration, it appears to me to be more probable that the lady was intending to pass anything belonging to her under this general description rather than anything belonging to her husband in her right.

Under the circumstances, I hold that no case of election arises with regard to any property which was the husband's at her death other than this particular gold watch.

With regard to the point which arises, namely, whether a married woman's will can ever raise a case of election, the authorities are not in a very satisfactory condition. It seems reasonably clear that under the law prior to the Wills Act, 1837, no one could, by virtue of the doctrine of election, devise real estate away from his heir by means of a will not capable of passing such real estate. The authority for that is *Hearle* v. *Greenbank*. (1) I quote that case merely as an illustration, because there are other cases in the books to the same effect. This doctrine has been applied since the Wills Act to the will of a married woman, Kay J. having held in *In re De Burgh Lawson* (2) that a married woman's will, being void at law as

(1) (1749) 1 Ves. Sen. 298; 3 Atk. 695. (2) 34 W. R. 39.

PARKER J. 1909 HARRIS, *In re.* LEACROFT *v.* HARRIS.

to her real estate, could not raise a case of election so as to defeat the right of her heir. Now Jarman in his book on Wills, 5th ed. vol. i. p. 419, says that in a similar way a married woman cannot defeat her husband's marital rights to property over which she has no testamentary power. He cites *Rich* v. *Cockell* (1) in support of this proposition. This case is not a very satisfactory one. It may have turned merely on the point that the will in question had not been proved and the unwillingness of Lord Eldon to decide a point which would not arise if the probate were ultimately granted in a certain form. Part of the property as to which the question of election was said to arise in that case consisted at the date of the will of a chose in action of the wife, but the husband subsequently reduced that chose in action into possession during the coverture before the wife's death. The remainder of the property as to which a case of election was said to arise was a diamond ring belonging to the husband, his title to which was, as far as I can make out, complete without the assertion of any jus mariti. The will of the wife had not, as I have said, been proved, and it was in dispute whether probate should be granted confined to her separate estate, or whether probate should be granted in the way usual in cases where the husband assented to the wife's will, it being alleged, but disputed by the husband, that the consent had been given. It appears to me that, if the husband had in fact consented to the will, no case of election, strictly speaking, could have arisen, for he would have assented to the bequest of his own property which the will contained. It was argued on the other hand that if he had not consented he might disclaim anything coming to him by virtue of the will and claim de jure mariti, upon taking administration, anything which would have come to him under the will, for it is to be observed that the only gift to him under the will of any property which the wife had power to dispose of was contained in a residuary gift, and a failure of that residuary gift would have led to intestacy, and under the intestacy he could have claimed the separate property of the wife de jure mariti. In answer to the argument as to whether a case of election arose if the

(1) 9 Ves. 369.

probate were granted confined to separate estate, Sir Samuel Romilly mentioned the case of a devise to an heir-at-law. Suppose, he said, there was a devise to such an heir of property which such heir would take if there had been no devise at all, and there was also in the same will a devise to another person of an estate belonging to the heir in his own right, then a case of election would arise, though he could point out no case which had decided the point; and he said that if you applied that analogy to the case in question, where a married woman gave her separate property to her husband, he might still be put to his election, although but for the bequest he would have taken that separate property. With regard to that argument Lord Eldon in the first instance reserved his decision, saying he did not recollect any case of an heir which would form an answer to the objection made for the defendant in the action, namely, the husband, but that he would consider the point. As a matter of fact the question had been already decided against the heir in the case which is quoted in a note to *Rich* v. *Cockell* (1); but Lord Eldon does not seem to have remembered the case, and reserved his decision on this point. He never gave it, at any rate, in express terms, for when he came finally to dispose of the case he appears to have disposed of it on the ground that the will had not yet been proved, and he could not therefore say whether he should treat it as a will confined to separate property or as a will which the husband had assented to, this being a question for the Ecclesiastical Courts; and it is possible, it seems to me, that all he meant was "I am not going to decide the question unless in the events which may happen I am bound to decide it, and that will depend on how probate is granted." On the other hand, his meaning (not a very clearly expressed one) may be that if the probate were confined to the separate estate of the wife no question of election would arise. If Lord Eldon did really mean that, assuming the probate were granted confined to the separate estate, no case of election would arise, the effect of the decision is far wider than the statement which Mr. Jarman deduces from it. It practically decides that no married woman can raise a case of election at all, or at any rate any case of

(1) 9 Ves. 374.

PARKER J. 1909 HARRIS, *In re.* LEACROFT *v.* HARRIS.

election against her husband; though I see no reason why, if it applies to the husband in respect of his own property, it should not apply also to a stranger. It appears to me quite easy to see the principle of the cases as to defeating the rights of the heir, and also quite easy to see how this principle can be extended to cases in which a married woman endeavours to defeat her husband's marital right by a will without his consent. No one ought to be allowed to do indirectly with his or her property what the policy of the law does not allow to be done directly; but this principle does not seem to me to be really applicable where the married woman is attempting to deal, not with property which belongs to her and which she cannot, except in a certain way or with certain formalities, leave away from her heir or from her husband, but is dealing with property which already belongs to her husband in his own right, even although he may have acquired it in hers, or to a stranger. In such a case I see no reason in principle why a case of election should not arise, but if I assume, because of Lord Eldon's decision, that a case of election does not arise in such a case, the reason must, I think, be that if the married woman had acquired the property prior to the date of the will she could not have disposed of it because of her husband's right without his assent. At the same time, if one is forced to introduce any hypothesis into the explanation, it is not obvious to me why the hypothesis should not be the acquisition by the married woman of the property to her separate use, on which hypothesis the will would be effective. Assuming, however, that the test is whether, if the married woman had acquired property prior to the date of her will, such property would have passed by the will, the question arises whether the Married Women's Property Act, 1882, has made any difference. The testatrix in this case married long before January 1, 1883, and she made her will in 1903. The question whether the property in question would have passed by her will would thus depend on the date when she acquired it. If she acquired it prior to January 1, 1883, it would not pass; if she acquired it after January 1, 1883, it would pass, for all property acquired by her after that date is her separate property which he has the same power to dispose of as if she were a feme sole

PARKER J.

1909

HARRIS, *In re.* LEACROFT *v.* HARRIS.

The more reasonable time to take for the purpose of a test would, it seems to me, be immediately before the date of her will, and if in the present case she had acquired the property in question immediately before the date of the will, it would undoubtedly have passed by her will. Doubting as I do the validity of the propositions of law said to be deducible from *Rich* v. *Cockell* (1), and thinking that the only intelligible explanation of these propositions, if I am to take them as law, has been removed by recent legislation as to married women, I hold that the husband in this case is put to his election as to the watch.

Solicitors: *Maude & Tunnicliffe, for Taylor, Simpson & Mosley, Derby; Satchell, Chapple & Son; A. Toovey, for Bennett, Boycott, Orme & Goodman, Chapel-en-le-Frith.*

F. E.

PARKER J.

1909

March 10, 11; *May* 21, 22 25.

In re BREMER'S PATENT.
Ex parte BRAULIK.
In re HÖGNER'S PATENT.
Ex parte BRAULIK.

Patent—Revocation—Patented Article or Process manufactured or carried on exclusively or mainly out of United Kingdom—Failure in United Kingdom—Patents and Designs Act, 1907 (7 *Edw.* 7, *c.* 29), *ss.* 24, 27.

If a patentee proves that he has done his best to fulfil the obligations arising under the Patents and Designs Act, 1907, by establishing in this country an industry in the patented article, and that his want of success has been due to circumstances beyond his control and not to the manner in which he has exercised the rights conferred upon him by his patent, the patent ought not to be revoked.

THESE were appeals from two decisions of the Comptroller-General of Patents by which he revoked (1.) letters patent granted to H. Bremer and belonging to the British Westinghouse Electric and Manufacturing Company, Limited, and (2.) letters patent granted to P. Högner and belonging to the Körting und Mathieson Actien-Gesellschaft. The appeals came on together

(1) 9 Ves. 369.

PARKER J. 1909

BREMER'S PATENT, *In re.*

BRAULIK, *Ex parte.*

HÖGNER'S PATENT, *In re.*

BRAULIK, *Ex parte.*

for hearing on March 10 and 11, when questions of the construction of ss. 24 and 27 of the Patents and Designs Act, 1907, and of the proper mode of procedure were argued. Judgment on most of these points was included in the decision of Parker J. in *In re Hatschek's Patents, Ex parte Zerenner* (1), and the form of procedure has now been settled by the new rules published in the *Weekly Notes* of May 29, 1909, Pt. II., p. 198.

The appeals were adjourned for hearing on further evidence, and came on again on May 21 and 22, when his Lordship reserved judgment.

Walter, K.C., and *E. Russell Clarke*, for the owners of the patents.

Bousfield, K.C., and *J. Hunter Gray*, for Braulik.

Sir W. S. Robson, A.-G., and *Sargant*, for the Crown.

May 25. PARKER J. read the following judgment:—These appeals are from two decisions of the Comptroller under s. 27 of the Patents and Designs Act, 1907, by one of which, dated February 9, 1909, he revoked the letters patent No. 18,786* of 1902, belonging to the British Westinghouse Electric and Manufacturing Company, Limited (whom I will hereafter call the company), and by the other of which, dated February 18, 1909, he revoked the letters patent No. 23,606 of 1902, belonging to the Körting und Mathieson Actien-Gesellschaft, a German company, which I will hereafter refer to as Körting and Mathieson. The two cases are closely associated together, and cannot, in my opinion, under the circumstances, which are peculiar and not likely to recur, be dealt with separately. I may say at once that I agree with the Comptroller (and indeed it was not really disputed before me) that in each case the patented article is manufactured mainly outside the United Kingdom, so that in the one case the company, and in the other Körting and Mathieson, have to prove that the patented article is manufactured to an adequate extent within the United Kingdom, or give satisfactory reasons why it is not so manufactured. In order to discharge this onus they must at least shew, with regard to their respective letters patent,

(1) Ante, p. 68.

that they have not by any exercise of their patent rights given preference to foreign over British industry, or otherwise done anything inconsistent with the obligations arising under the Act.

The material facts may be shortly stated as follows. In November, 1901, the company acquired from one Bremer a number of patents granted in this country for improvements in connection with arc lamps, together with the benefit of any further improvements to be made by him within the period limited by the contract of purchase. The consideration paid by the company under the terms of this contract, as modified by a later contract of February 28, 1903, was 15,000*l.*; this sum, however, included payment for certain shares in the Deutsche Gesellschaft Bremer Licht, said to be now worthless. Bremer subsequently obtained the letters patent No. 18,786* of 1902 for further improvements, being the letters patent the subject of the first of these appeals, and in due course, pursuant to the contract, he assigned the same to the company. The company had not prior to their acquisition of the Bremer patents made or dealt in arc lamps, and they acquired the patents with a view to establishing an industry in arc lamps at their works at Trafford Park. Immediately after this acquisition they commenced manufacturing lamps under the patents, and, with the object of forthwith creating a trade in this country in the articles they were commencing to manufacture, bought from Bremer a number of lamps already made by him abroad. These lamps supplied by Bremer, as also the lamps first manufactured by the company, proved defective, and in consequence the company acquired from the first a bad reputation among the public in this kind of goods. They continued, however, at considerable expense, to make experiments in order to overcome their initial difficulties in the manufacture and remedy the defects which they had discovered in the articles as supplied by Bremer and as made by themselves, utilizing for the purpose the improvements the subject of the letters patent No. 18,786* of 1902. Shortly after Bremer's application for his 1902 patent, namely, on October 29, 1902, one Högner, an engineer in the employment of Körting and Mathieson, applied for, and he subsequently obtained, letters patent for practically the same invention, being

PARKER J. 1909 BREMER'S PATENT, *In re.* BRAULIK, *Ex parte.* HÖGNER'S PATENT, *In re.* BRAULIK, *Ex parte.*

letters patent No. 23,606 of 1902, the subject of the second of these appeals. Körting and Mathieson, who acquired these letters patent from Högner, were already famous for the manufacture of arc lamps, being, it is said, the premier firm of arc lamp manufacturers in the world. Possibly by reason of their familiarity with this manufacture, they did not encounter the difficulties experienced by the company, and in 1903 began to import into this country lamps made under Högner's patent which were admittedly an infringement of Bremer's 1902 patent, if such patent be valid. This was done through the Union Electric Company, Limited, who acted as their agents. In 1903 twenty-six of such lamps were imported; in 1904, 398; and in 1905 as many as 2348. It does not appear when the company first became aware of this importation of infringing lamps. Up to the beginning of 1906 they were still busy experimenting and trying to obviate the difficulties they had encountered in manufacturing under the Bremer patents. At the beginning of 1906 they had, as they thought, obviated all such difficulties, and were then at any rate fully aware of the importation of infringing articles by the Union Electric Company, as agents of Körting and Mathieson. Questions seem, however, to have arisen as to the validity of their 1902 patent, one objection suggested being based on disconformity. Under these circumstances they had two courses open to them: either they could commence proceedings for infringement, at the possible risk of having their 1902 patent declared invalid, and perhaps incidentally setting up Högner's patent, or else they could endeavour to come to terms with Körting and Mathieson. They chose the latter course, and entered into negotiations with Körting and Mathieson and the Union Electric Company which resulted in an agreement of March 12, 1906. Under this agreement they granted to Körting and Mathieson a licence under the Bremer patents for ten years from January 1, 1906, determinable at the end of the first five years by six months' notice given by either party, and subject to a royalty of so much per lamp sold in the United Kingdom or the Isle of Man, and they obtained from Körting and Mathieson a free licence under the Högner patent of 1902 for the same period and determinable in the same manner. The agreement states that

Körting and Mathieson have to pay Bremer certain royalties on goods made in Germany under his patents and imported into the United Kingdom, and provides in effect for the increase of the royalty to be paid to the company by one half of any abatement which Körting and Mathieson may obtain from Bremer in respect of royalties payable by them to him. It also provides that the company shall not grant other licences at a less royalty than therein specified. This minimum royalty for other licences is greater than the royalty payable by Körting and Mathieson to the company, but less than the combined royalties payable by Körting and Mathieson to the company and to Bremer. If Bremer were persuaded to forgo half the royalty payable to him by Körting and Mathieson, the royalties payable by the latter to the company and to Bremer would be equal to the minimum royalty fixed for other licences. The provision as to this minimum royalty is not to apply to compulsory licences or to licences granted to other Westinghouse companies in any part of the world. If the company desire it, Körting and Mathieson agree to supply them with any lamps of the kind known as flame lamps, which would include lamps made under either of the 1902 patents, at the prices therein mentioned. There is also a provision regulating the prices at which lamps are to be sold by the company or their licensees. These are not to be less than the prices listed by Körting and Mathieson in Germany. Having come to this agreement, the company proceeded to put their goods on the market in competition with the lamps of Körting and Mathieson. In 1906 they made under the Bremer 1902 patent and sold between 100 and 200 lamps. In 1907 they made and sold 527 of such lamps, and in 1908, up to November 2, they made and sold 530 of such lamps, and had 274 made by them still in stock. On the other hand, in 1906 Körting and Mathieson imported into this country 3467 similar lamps; in 1907, 3612; and in 1908, 2777. It appears, therefore, that the company have not as yet been very successful in competing with Körting and Mathieson.

They account for this by the fact that they have only recently started the manufacture of arc lamps and unfortunately acquired a bad reputation for their goods from the first. On the other

PARKER J. 1909 — BREMER'S PATENT, *In re.* BRAULIK, *Ex parte.* HÖGNER'S PATENT, *In re.* BRAULIK, *Ex parte.*

hand they say that Körting and Mathieson have not only the experience of years to help them, but have a world-wide reputation, so that the public prefer their lamps to those of other manufacturers. Further they say that a number of cheap infringements of their patent are being imported into or made and sold in this country, and that they have instituted proceedings to stop such infringements, which proceedings are still pending. Their hope is that they are now manufacturing a really good lamp, and that when this becomes better known, and infringement has been stopped, they will be able to compete successfully with Körting and Mathieson in this country, if not in foreign markets. As against this it is said on behalf of the respondent to this appeal, who is also a defendant in one of the actions for infringement above referred to, that by neglecting to institute infringement proceedings between 1903 and 1906 in respect of Körting and Mathieson's imported lamps, by entering into the agreement of March 12, 1906, and by bungling efforts to put competing lamps on the market, they have, in effect, destroyed all chance of establishing an industry in this country in the article protected by Bremer's 1902 patent, and that such patent ought therefore to be revoked under s. 27 of the Act of 1907. It is even suggested that, whatever may have been their intention at first, they must have given up any bona fide intention of starting such an industry when they entered into their agreement of March 12, 1906, with Körting and Mathieson.

Now I have given the matter a good deal of consideration, and I have come to the conclusion that the company have been, and are still, making a bona fide attempt to establish in this country an industry in arc lamps. They acquired the Bremer patents, including the patent of 1902, for this purpose, and they have expended large sums of money with this end in view, beyond what they paid to Bremer. It is by no means an easy thing to establish an industry for the first time. Both managers and workmen must buy their experience, and the attempt becomes the more difficult if it must be made in the teeth of the competition of a firm which has already acquired a great reputation for the quality of its own goods and has access to English markets. If, however, the person who attempts to establish such

an industry has patent rights in this country, such patent rights are, of course, of great value, for they will enable him to exclude or limit the competition which otherwise might prove fatal; but even such patent rights may be of little use if the competitor is in a position to put goods on the market which he can sell by virtue of his reputation, even if they do not contain the latest improvements. In the present case it was obviously the right policy of the company to use their 1902 patent to limit or exclude competition from Körting and Mathieson. Possibly they might have succeeded in stopping altogether the importation of goods made by the latter under the Högner patent. They came to the conclusion, however (and I am not in a position to say it was a wrong conclusion), not to attempt this, but to use their 1902 patent to limit the competition they feared. By the agreement of March 12, 1906, they handicap Körting and Mathieson to the extent of the royalty imposed on them, and obtain a free licence themselves in respect of the Högner patent, thus using their patent rights to increase and not to diminish the chance of being able to establish an industry in arc lamps in this country. It is true they limit their own power of granting licences at royalties below the fixed minimum, but I cannot see that this fixed minimum is unfair, and, if it were, it does not prevent any one applying for, and obtaining, a compulsory licence. It is true also that they limit their power of underselling Körting and Mathieson in the British market, but it is still open to them to compete with Körting and Mathieson by putting an article as good or better on the market at the same price. If they succeed in establishing their patent rights, and can obtain a reputation for their goods before January 1, 1911, they can determine the agreement of March 12, 1906, and altogether exclude foreign goods made under their 1902 patent for the remainder of the term for which the patent was granted. I am satisfied that it is to their interest to manufacture under their patent to as large an extent as possible in the United Kingdom, for, leaving out of account the moneys expended in purchasing and experimenting with their patents, their profit on each lamp now made and sold by them is greater than the royalty they receive on

PARKER J. 1909 BREMER'S PATENT, *In re.* BRAULIK, *Ex parte.* HÖGNER'S PATENT, *In re.* BRAULIK, *Ex parte.*

each lamp imported and sold by Körting and Mathieson. I can find nothing in the company's conduct inconsistent with a bona fide intention to manufacture the patented article to as large an extent as possible in this country, and, as I have already said, the agreement of March 12, 1906, is conducive to this end. With regard to the delay between the year 1903, when Körting and Mathieson first began to import lamps made under the Högner patent, and the date of this agreement, it is, of course, true that, had the agreement been arrived at earlier, the company would have gained in royalties, but as they were not in a position to put their lamps on the market before 1906, this would not have prevented Körting and Mathieson from being the first to establish a business in the patented article in the United Kingdom. In my opinion the company have throughout used, and still are using, their best endeavours to fulfil the obligation arising under the Act of 1907 by establishing in this country an industry in the article the subject of their 1902 patent. They have further proved to my satisfaction that their want of success up to the present time has been due to circumstances beyond their own control, and not to the manner in which they have exercised the rights conferred upon them by the patent in question. The Act of 1907 was never meant to penalize want of success when the patentee has done his best, and I cannot, therefore, come to the conclusion that the company's patent ought to be revoked.

With regard to Högner's patent, Körting and Mathieson have not so strong a case for resisting its revocation as the company have for resisting the revocation of Bremer's patent of 1902. No doubt they can properly claim that all the lamps made by the company under the last-mentioned patent ought to be taken as made under the Högner patent for the purpose of considering whether Högner's patent should be revoked. But Körting and Mathieson have made no attempt to work Högner's patent in this country otherwise than through the company, and it is largely due to the competition of lamps made by them abroad that the company have been able to manufacture and sell so few lamps in this country. On the other hand they may fairly say that they have not only granted a free licence to a company

which intended, and was presumably qualified, to work the patent in this country, but have precluded themselves from importing and selling competing lamps without paying a substantial royalty. Further, their position with regard to the Högner patent has throughout been rather difficult. That patent, so far as I can see, can be valid only if Bremer's 1902 patent be invalid, and then only if such invalidity be due to the objection based on disconformity. For some years litigation has been pending as to the validity of Bremer's 1902 patent, and, until its validity be decided, Körting and Mathieson have, I think, some excuse for hesitating to lay down plant with a view to working Högner's patent in this country, more especially as their licence under the Bremer 1902 patent is terminable on January 1, 1911. If it be ultimately decided that Bremer's 1902 patent is invalid, and Högner's patent valid, and Körting and Mathieson do not then forthwith take steps for working Högner's patent, or ensuring that it be worked to an adequate extent in this country, I think they will have great difficulty in resisting its revocation. I have, however, come to the conclusion that under present circumstances I may fairly accept the reasons given by them for the small extent to which the patent is worked in this country as satisfactory, and I come to this conclusion the more readily because the revocation of this patent may make things even more difficult for the company, who are, as I have said, doing their best to create an industry in the patented article in the United Kingdom.

I propose, therefore, in each case to reverse the Comptroller's decision so far as it revokes the patent in question, but not to disturb his directions as to the costs of the proceedings before him. I shall allow no costs of the appeals, except the Attorney-General's costs, which I direct to be borne and paid in the one case by Mr. Braulik and the company in equal shares, and in the other case by Mr. Braulik and Körting and Mathieson in equal shares. I deal with the costs in this way because my decision is in each case arrived at upon evidence which was not, and ought to have been, before the Comptroller, and which I have admitted only because these are two of the earlier cases under the Act, and I am not sure that either the company or

PARKER J. 1909 BREMER'S PATENT, *In re.* BRAULIK, *Ex parte.* HÖGNER'S PATENT, *In re.* BRAULIK, *Ex parte.*

Körting and Mathieson fully realized, or could be expected to realize fully, the onus which lay upon them. My decision to allow further evidence on the appeals must not, however, be taken as a precedent governing other cases.

Solicitors: *Faithfull & Owen; Hextalls; Osborn & Osborn; Solicitor to the Board of Trade.*

H. C. R.

C. A. 1909 *April* 22, 30; *May* 1, 3, 20.

CUTHBERT *v.* ROBARTS, LUBBOCK & CO.

[1908 C. 392.]

Bank—Banker's Lien—Stockbroker—Authority to borrow—Pledge of Client's Security—Overdraft—Special Borrowing.

Though bankers have a general lien upon the securities of a customer deposited with them to secure an overdraft, this lien does not attach to securities deposited by a customer and known to the bank to belong to some other person and to have been deposited for a special purpose.

Where a customer draws a cheque for a sum in excess of the amount standing to the credit of his current account, it is in effect a request for a loan, and if the cheque is honoured the customer has borrowed money; but it does not follow that a transaction of this kind is a borrowing upon security not belonging to the customer and deposited for another purpose.

Hambro v. *Burnand*, [1904] 2 K. B. 10, distinguished.

APPEAL from a decision of Joyce J. which raised a question as to the extent to which the defendants, bankers, were entitled to a charge on securities belonging to the plaintiff and deposited with them by a stockbroker for a special purpose, for overdrafts by the stockbroker. The action was tried with witnesses, and the case turned mainly on what passed between the defendants' head manager and the stockbroker, the result of which is stated in detail in the judgment of Buckley L.J., but the following summary of the facts is sufficient to make the arguments intelligible.

Cancellor was a broker on the Stock Exchange; the defendants were his bankers. In September, 1907, the plaintiff wished to invest 1000*l.* in some American shares, and asked Cancellor if he could arrange to borrow this money for her from his bankers on

the security of 100 Provident Clerks shares, worth about 1350*l.* Cancellor saw a Mr. Faulks, the manager of the defendants' bank, who, on the evidence, was held to have understood that the shares to be deposited did not belong to Cancellor, but to a customer. The result of the interview, according to a memorandum made at the time (in the judgments and elsewhere in this report referred to as W. J. F. 1), was that Cancellor was to have an overdraft "up to 1350*l.* for three months at Bank rate, against Americans worth about 1350*l.*, and transfer certificate (with letter of authority) of 100 shares Provident Clerks."

On September 20, Cancellor informed the plaintiff that he had arranged to get a loan from his bankers, the defendants, on her 100 Provident Clerks shares, and that he had bought for her fifty Americans. The plaintiff executed a blank transfer of the Provident Clerks shares, and also a letter of authority "to borrow money upon the 100 Provident Clerks shares, for which I have handed you certificate and transfer signed by me." Cancellor took the transfer certificate and letter of authority to the bank, and afterwards bought the American shares for the plaintiff, but, instead of borrowing the money to pay for them, carried over the transaction upon the Stock Exchange, and, the price having fallen, the plaintiff became liable for about 240*l.* in respect of differences. Cancellor then borrowed 250*l.* from the bank, who opened a loan account, and credited his current account with that amount.

On the settling day (October 30), many cheques drawn by Cancellor were presented, with the result that it was reported to the manager of the bank that Cancellor was "500*l.* out"; the manager told the cashier that the amount was covered by security; the cheques were honoured, and, through a mistake, further cheques to a large amount beyond the value of the shares were also honoured. The next day Cancellor was declared a defaulter on the Stock Exchange, and his account with the defendants being largely overdrawn, they claimed to retain the plaintiff's Provident Clerks shares.

Joyce J., after stating the result of the evidence, continued:—The bankers now claim to apply the plaintiff's shares or the proceeds thereof to the liquidation of the debit balance upon

C. A. 1909

CUTHBERT v. ROBARTS, LUBBOCK & Co.

Cancellor's current account. This, in my opinion, they are not entitled to do. These shares, as the bankers all along well knew, were not the property of Cancellor; he had merely an authority to borrow on them, and he never exercised or affected to exercise this authority except to the extent of the 250*l.* advanced on October 15. Indeed if he had borrowed upon these shares for any larger sum or for his private purposes he would have been defrauding the plaintiff and criminally responsible. I think the bankers in the circumstances could not make any further advance upon the loan account except at the request or with the express authority of Cancellor. It is true that the bankers have a general lien on the securities of any customer deposited by him with them otherwise than for a particular purpose, to secure any sum in which the customer may be indebted to the bankers. This, however, is a lien upon the securities of the customer and not upon those of other persons, and the general lien of a banker does not attach even upon money or securities of the customer known to the bankers to be affected by a trust. But the shares in question in the present case were not the property of Cancellor, the customer of the bank, at all. Moreover, these shares were deposited for a special purpose, namely, to be a security for a particular loan to be obtained by Cancellor from the bankers under his authority to borrow, and which he did obtain to the extent of 250*l.* and no more. For Cancellor, in my opinion, never exercised—he certainly never intended to exercise—the authority he had to borrow on the plaintiff's shares except to the extent of the 250*l.* advanced in pursuance of the request contained in Cancellor's letter of October 15. As I have said already, there was no arrangement that he should be allowed any overdraft against the deposited securities. His drawing of cheques for his own purposes, which might or might not be met according to the payments previously made to the credit of his current account, I hold not to be in any sense an exercise of his power or authority to borrow on the plaintiff's shares; consequently these shares in favour of the bank do not stand charged with more than the 250*l.* and interest thereon at the agreed rate from October 15. Subject to this being discharged the plaintiff is

entitled to have her shares restored to her, and the defendants, the bank, must pay the costs of the action.

The bank appealed.

Hughes, K.C., and *Dighton Pollock*, for the appellants. The plaintiff gave a clear and explicit authority to Cancellor to borrow money on the security of the Provident Clerks shares. The production of that authority to the bank justified them in advancing the money on those shares, and they had nothing to do with the purpose for which the money was applied. It was no part of the authority that the money should be applied for a particular purpose. The intention was that Cancellor should carry out the whole transaction and that the money should be under Cancellor's control for some time at any rate. Cancellor was to get the loan and Cancellor was to purchase the shares. The bank were under no obligation, nor was it possible for them to trace the destination of the money. The learned judge drew some distinction between an overdraft and a loan, but there is no foundation for any such distinction. Where the agent has thus exceeded his authority the principal must nevertheless pay all that was so borrowed. *Brocklesby* v. *Temperance Permanent Building Society* (1), an analogous case to the present, is considered in *Bryant, Powis & Bryant, Ld.* v. *Quebec Bank* (2), and again in *Hambro* v. *Burnand* (3), from which it is clear that, where a written authority given to an agent covers the thing done by him on behalf of his principal, no inquiry is admissible into the motives upon which the agent acted.

The arrangement between Cancellor and Faulks, the bank manager, is immaterial when there was this formal and written authority to borrow on these Provident Clerks shares. It is alleged that the bank had notice of the purpose for which the money was wanted, but they never had any notice that the money was not being properly applied.

[*Rouse* v. *Bradford Banking Co.* (4) and *Robinson* v. *Montgomeryshire Brewery Co.* (5) were also cited.]

(1) [1895] A. C. 173.
(2) [1893] A. C. 170, 179.
(3) [1904] 2 K. B. 10.
(4) [1894] A. C. 586.
(5) [1896] 2 Ch. 841.

C. A. 1909

CUTHBERT v. ROBARTS, LUBBOCK & Co.

Younger, K.C., and *P. Wheeler*, for the respondent. This case differs from all other reported cases in this, that Cancellor did not intend to pledge and did not know he was pledging this security when he drew the cheques of October 30, and in the reported cases the mischief was caused by a fraudulent agent abusing his authority and pledging his client's securities for his own purposes. Further, the authority to borrow was that arranged at the interview between Cancellor and Faulks : the advance was not made on the written authority; that was not known to or ever seen by any of the bank officials. The arrangement made with Faulks excluded the possibility of a general lien. No reliance was placed upon what had been done by the principal : *Roots* v. *Williamson*. (1) The security never did belong to Cancellor, except for a limited purpose, and this distinguishes *Brocklesby* v. *Temperance Permanent Building Society*. (2) In *Hambro* v. *Burnand* (3) the written authority really carried out the arrangement between the parties ; that is not the case here; and besides the authority was to borrow on behalf of a client, not on his own account. The bank were not in this case holders for value without notice : *Earl of Sheffield* v. *London Joint Stock Bank* (4), where, as appears from *London Joint Stock Bank* v. *Simmons* (5), the bank had actual knowledge that the person pledging the securities had only a limited authority, as here, to raise money upon them. In the present case the arrangement was a loan up to 1350*l.* for three months upon security which was to include the American bonds when purchased, a loan therefore for a definite purpose on definite security; the bank is therefore estopped from claiming a general lien.

The owner is not precluded from denying the authority as against those who had notice, as the bank had, that the authority was limited : *Cole* v. *North Western Bank*. (6) It has been found as a fact by the Court below that this overdrawing was a separate transaction of loan irrespective of the liabilities on the current account; the case is similar to *Mutton* v. *Peat* (7),

(1) (1888) 38 Ch. D. 485.
(2) [1895] A. C. 173.
(3) [1904] 2 K. B. 10.
(4) (1888) 13 App. Cas. 333.
(5) [1892] A. C. 201, 208.
(6) (1875) L. R. 10 C. P. 354, 363.
(7) [1900] 2 Ch. 79.

but in that case there was no bargain as to the loan account being kept separate.

The principles as to bankers' lien and separate accounts are considered in *Brandao* v. *Barnett* (1) and *In re European Bank, Agra Bank Claim.* (2) The bank here must shew that by drawing cheques on his general account Cancellor was asking for security on the loan account, and it had no right to take anything from the separate loan account to pay an overdraft on the general account without a special request: *Ex parte Kingston.* (3)

It is said that on the faith of this security the manager, when told that Cancellor was "500*l.* out," authorized the overdraft; if so, then the utmost the plaintiff can be liable for is 500*l.*

Hughes, K.C., in reply. Cancellor deposited these shares as security for his own overdrafts up to 1350*l.*, and he had authority to do this. When an agent acts within his authority the question of estoppel does not arise. *Bank of Bengal* v. *Fagan* (4) shews that there was no transgression of the authority to borrow. The bank made the advance by way of overdraft and were entitled to debit Cancellor with the full 1350*l.* on his loan account. The drawing of a cheque, where there are no funds to meet it, is presumably a request for an overdraft: Paget's Law of Banking, 2nd ed. p. 6. It is clear on the evidence that there was a direct intention on the part of the bank to make this advance only as against the security they held.

Cur. adv. vult.

May 20. COZENS-HARDY M.R. The question in this appeal is as to the extent to which the defendants are entitled to a charge on certain shares of the plaintiff to secure a balance or part of a balance due to them from Cancellor, who was a broker employed by the plaintiff and a customer of the defendants.

The material facts may be shortly stated. The plaintiff wished to put 1000*l.* in some American shares, and asked Cancellor if he could arrange to borrow the money for her, and added that she could send a certificate of 100 Provident Clerks

(1) (1846) 12 Cl. & F. 787, 806.
(2) (1872) L. R. 8 Ch. 41.
(3) (1871) L. R. 6 Ch. 632.
(4) (1849) 7 Moo. P. C. 61, 74.

C. A. 1909 — CUTHBERT v. ROBARTS, LUBBOCK & Co. — Cozens-Hardy M.R.

shares worth 14*l.* 7*s.* each. Cancellor saw the manager of the bank. The result of the interview, as appears from a memorandum by the manager, was as follows: "F. Cancellor can have up to 1350*l.* for three months at Bank rate minimum 5 per cent. against Americans worth about 1350*l.* and transfer certificate (with letter of authority) of 100 shares Provident Clerks." The bank, therefore, had notice that the shares did not belong to Cancellor, but that they were to be placed at his disposal by means of a written authority from the unknown owner. On September 20, 1907, Cancellor informed the plaintiff that he had arranged to get a loan from his bank on her 100 Provident Clerks shares, and that he had bought for her fifty American shares. The plaintiff executed a blank transfer and also a letter, dated September 23, in the following terms:—"I duly authorize you to borrow money upon the 100 Provident Clerks shares, Nos. 6166 to 6265, for which I have handed you certificate and transfer signed by me." Cancellor took the transfer, the certificate, and the authority to the bank. On October 15 Cancellor wrote to the bank asking them to credit his account with 250*l.* "in respect of the security for, say, 1400*l.* I left with you last week." This was done, 250*l.* being placed to Cancellor's debit on a loan account and to his credit on his current account. Cancellor, without any instructions from the plaintiff, carried over the stock until the end of October account, by which time Americans had fallen considerably. On the settling day (October 30) many cheques drawn by Cancellor were presented, with the result that it was reported to the manager that Cancellor was 500*l.* out. The manager thereupon told the cashier that the amount was covered by security. The cheques were honoured, and through a mistake further cheques to a very large amount beyond the value of the shares were also honoured. Cancellor was hammered the next morning.

In these circumstances the plaintiff has tendered 250*l.*, but no more, though she does not admit that, in point of law, the bankers have any valid charge. The bankers claim a charge for the full value of the shares, and alternatively for the 500*l.* Joyce J. has decided in favour of the plaintiff.

I feel no doubt that the plaintiff is wrong in so far as it is

contended that the bankers were under any obligation to see that the purpose for which the money was to be borrowed was duly fulfilled, and in so far as it is contended that the bankers were not authorized to lend on the security of the 100 Provident Clerks shares alone without the Americans which were to be purchased, and in so far as it is contended that the bankers cannot be said to have relied upon the letter of authority, which the manager never saw. I am satisfied that the bank got a good charge for the 250*l.*, which was not applied in the purchase of shares. There was a request to advance on the security, and a compliance with the request, and it is wholly unimportant that the documents deposited were not opened or seen by the manager. But there is a ground upon which I think the plaintiff is entitled to succeed. The bankers cannot claim a general bankers' lien except upon the customers' own property. The transaction between the manager and Cancellor was not a deposit to secure the balance from time to time due on his current account. The deposited authority was only "to borrow money upon" the shares. If a customer draws a cheque for a sum in excess of the amount standing to the credit of his current account, it is really a request for a loan, and if the cheque is honoured the customer has borrowed money. But it does not follow that such a simple transaction is a borrowing upon a security not belonging to the customer and known to the bankers to be deposited for a special purpose. In my opinion the mere drawing a cheque by Cancellor, without any reference to the security, was not a borrowing upon the plaintiff's shares. It was not intended by him to be an act done in pursuance of the authority, and the bankers could not by their own mere volition treat it as an act done by Cancellor in pursuance of the authority.

For this reason, which is substantially that adopted by Joyce J., I think the appeal fails and must be dismissed with costs. I may add that in any point of view the bank could not claim more than the 500*l.*, for they did not intend to honour cheques beyond that amount on the faith of the deposit.

BUCKLEY L.J. In my judgment the decision of Joyce J. is right. I do not find that the case raises any new or difficult

C. A. 1909

CUTHBERT v. ROBARTS, LUBBOCK & Co.

Buckley L.J.

question of law. The whole matter turns upon that which took place between Cancellor and Faulks, the defendants' head manager, at 15, Lombard Street on September 20. To ascertain what was then arranged it is not necessary to travel outside the evidence of Mr. Faulks himself. The whole arrangement was made, completed, and ended on September 20. There was no subsequent arrangement. Mr. Faulks tells us so himself. The substance of what took place on September 20, I think, is this: Cancellor in substance said to Faulks, "These 100 Provident Clerks shares are not mine; I am authorized by their owner to pledge them to raise money for the purpose of buying some American shares; the shares so bought will not be mine, but will be the property of a client. If you will make me an advance for this purpose I will give you as security both the Provident Clerks shares and the American shares which are to be bought with the loan." The memorandum W. J. F. 1 is, I think, quite plain. The Provident Clerks shares were worth, say, 1400*l.* The defendants were agreeing to advance 1350*l.*, and as security for that advance they were to have not the Provident Clerks shares only, but the American shares also. The memorandum says so, and Mr. Faulks has said so quite plainly in his evidence. As regards the probabilities of the case, the bank would, of course, not have lent 1350*l.* with no greater margin than was afforded by the value of the Provident Clerks shares, say 1400*l.* Mr. Faulks' evidence upon this point is, in my opinion, in no degree shaken by what he said in re-examination. Answers given in re-examination to leading questions expressed in terms which conflict with what the witness has said in cross-examination are, I think, no guide in arriving at the truth. It is quite plain upon Mr. Faulks' evidence that the loan was asked for and granted for a specific purpose, namely, to take up the American shares, and that the bank knew that neither the Provident Clerks shares nor the American shares were Cancellor's property, but that Cancellor was buying and giving security upon some one else's property for money to be advanced to him for a specific purpose, namely, the purchase of the American shares.

The bank required a letter of authority (see the memorandum W. J. F. 1). Cancellor lodged with the bank an authority, signed

by the plaintiff, which is in its terms not limited to borrowing for a purpose, but it is a general authority to borrow. The bank never knew the contents of that letter of authority. They therefore did not act upon it in any way. In that which they did in October the bank acted upon the facts which I have stated, and upon the footing that the authority was not a general but a limited authority. The decision in *Hambro* v. *Burnand* (1) would have been applicable if Cancellor had purported to borrow on his own behalf and if the bank had not known from the conversation of September 20 that, as the fact was, his authority as between himself and the owner of the shares was not a general authority to borrow, but an authority to borrow for a purpose. He by his letter to Mrs. Cuthbert of September 21 described the authority of September 23 as being an authority authorizing him to raise a loan on Mrs. Cuthbert's behalf, and as between those two persons there is no question but that the authority of September 23, though general in its terms, was given in order to enable him to borrow, not on his own, but wholly on her behalf. Under these circumstances *Hambro* v. *Burnand* (1) is not an authority upon which the bankers can rely.

These being the facts, the case is, that the bankers, having agreed to make Cancellor an advance for a purpose, claim in this action to avail themselves of the security in respect of moneys which he never asked them to advance and which they never in fact advanced for that purpose. Overdraft, of course, is borrowing, but overdraft by Cancellor on his general account was not such a borrowing as entitled the bank to security under the arrangement made on September 20. When he wrote on October 15 asking for the credit of 250*l.* in respect of this security, it may be that the bank would have been entitled to hold the security for that sum whether he had or had not applied it for Mrs. Cuthbert's benefit. It is not necessary to decide this, for the plaintiff does not make any claim as regards the 250*l.* But mere overdraft on his general account was no request by him to lend on this security. Under the arrangement of September 20 the 250*l.* was placed, and rightly placed, to the debit of a loan account and to the credit of his current account. Any further sum for

(1) [1904] 2 K. B. 10.

C. A. 1909

CUTHBERT v. ROBARTS, LUBBOCK & CO.

Buckley L.J.

which security could be claimed ought in the same way to have gone to the debit of the loan account and credit of the current account, but there was no right to debit this loan account in respect of moneys borrowed by way of overdraft on his general account. The plaintiff is in my opinion entitled to succeed upon the ground, first, that at the date of the arrangement of September 20 the bank had notice that Cancellor was not entitled to borrow for his general purposes, and that they cannot rely upon the authority of September 28 as an authority to borrow in general terms; and, secondly, on the ground that although overdraft in general is borrowing, yet overdraft by Cancellor on his general account was not borrowing within the memorandum W. J. F. 1 and of the arrangement made on September 20. Upon these grounds I think that the decision under appeal was right and that this appeal ought to be dismissed with costs.

KENNEDY L.J. In no event, I think, could the defendants be justified in making the security of the plaintiff's deposited share certificates available for more than 500*l.* of Cancellor's overdraft of October 30, 1907. It was only to that extent that the bank manager on that day authorized an overdraft in reliance upon the security.

The question whether or not to this extent the defendants' appeal ought to succeed depends, in my view of the case, upon the answer which ought to be given upon a single point. Were the defendants legally entitled to treat Cancellor's overdrawn cheques on October 30 as requests on his part to exercise his right to borrow against the deposited security?

If the respondent's case could find support only upon the basis of some of the contentions which were put before us for the respondent in the course of the hearing, I should feel great difficulty in dismissing this appeal. I could not myself hold that the bank might not properly rely upon the security which it held, because, as between Cancellor and the bank, it was by agreement entitled to receive, as security for the borrowed money, not merely the certificates of the Provident Clerks shares, but also, when they had been purchased, the American shares. As between the plaintiff and the bank, by the terms of her written

authority of October 15, the plaintiff acknowledged to the bank that Cancellor was authorized to borrow money upon the Provident Clerks shares. There is no evidence upon the point, one way or the other, but it might be possible, no doubt (although, having regard to the broker's position, I should be inclined to think it in this case improbable), that the seller of the American shares might not insist upon cash before delivery, but might accept Cancellor's cheque; and in this event the bank might get a deposit of the American shares from Cancellor, before honouring his cheque in payment for them. But, as a matter of business, I should certainly suppose that the true meaning of the agreement between the bank and Cancellor, as the terms of her written authority shew the plaintiff herself intended, and as the subsequent drawing of 250*l.* and its acceptance by the bank shews that Cancellor and the bank also intended, was that an advance against the Provident shares should be made by the bank to Cancellor in order to pay for the American shares, with an obligation as part of the agreement on Cancellor's part that the American shares, whenever obtained by him, should be lodged with the bank as a further security. It was not intended by the parties that the bank, after receiving the Provident share certificates, should refuse to advance to Cancellor money to pay for the American shares unless he first lodged them with the bank. Nor, again, can I accept an argument that the bank could not be held entitled to rely upon the security merely because Cancellor's cheques were not in fact drawn by him for the special purpose of this transaction, i.e., to pay for the American shares bought on account of the plaintiff. The bankers' rights in respect of the deposited security could not, in my judgment, be affected in the circumstances of this case by any misapplication by the broker of any moneys which had been advanced by the bank to him strictly in compliance with the agreement for the advance. And it is further, in my view, immaterial that the bank manager cannot say that he himself ever saw the actual letter of authority until after October 30.

But what is, in my judgment, fatal to the defendants' case is that the agreement made between the defendants and Cancellor was, as I understand the facts, an agreement for a special

C. A. 1909 — CUTHBERT v. ROBARTS, LUBBOCK & CO. — Kennedy L.J.

borrowing by Cancellor from the defendants for a particular stated purpose with a security therefor in the shape of the Provident Clerks shares against which he was to draw specifically, and was not an agreement for a secured overdraft on Cancellor's current account. The transaction of October 15 in regard to the 250*l.* indicates plainly what both parties understood to be the proper way of using the agreement. Having so agreed, and knowing that the Provident Clerks shares did not belong to their customer, the defendants, as against the owner of the shares, were not entitled to treat cheques drawn by Cancellor apparently upon his current account as instruments of borrowing upon the specially secured account, and so to get for them the advantage of its covering security. To the extent of the 250*l.* the claim of the bank is not disputed.

Having had the opportunity of reading the judgment prepared by the Master of the Rolls, which states the material matters of fact, and in whose reasoning and conclusions I concur, I desire only to add that as I understand the judgment of my brother Joyce it is, in substance, based upon the same grounds as those upon which I have briefly stated that, in my opinion, it ought to be affirmed.

Solicitors: *Golding, Hargrove & Golding; Leighton & Savory.*

W. C. D.

In re STAWELL'S TRUSTS.
POOLE *v.* RIVERSDALE.

[1908 S. 2251.]

C. A. 1909 *May* 19, 20.

Settlement—"Eldest Son"—Portions for younger Children vesting at twenty-one—Period of Distribution postponed—Accelerating Period of Distribution—Younger Son afterwards becoming Eldest Son.

A testator by his will settled real estates on his daughter for life with remainder to her first and other sons successively in tail male with remainders over, and with power for her, on her marriage, by deed to limit a life estate to her husband and to charge 6000*l.* on the estates as portions for her younger children, to be payable at such times or time and in such manner as she should by deed appoint, and in default of appointment to be divided equally amongst such younger children to become vested interests in sons at twenty-one and in daughters at twenty-one or marriage.

In 1845 the daughter married, and by her marriage settlement a life estate was given to the husband and a term of years was limited upon trusts, in the events which happened, after the death of the survivor of the husband and wife to raise the portions to vest in and be payable to younger sons at twenty-one and daughters at that age or marriage, but payment to be postponed until the death of the survivor of the husband and wife, unless the husband should signify in writing that the same should be sooner paid. There were three children, two sons and a daughter, all of whom attained twenty-one before 1882, when the mother died. In 1897 W., the younger son, mortgaged his portion (3000*l.*), the father joining in the mortgage deed to signify that the sum should be raisable immediately. In 1900 W., on the death of his elder brother without issue, became the eldest son, and in 1905, on the death of the father, succeeded to the estates as tenant in tail, and afterwards died without issue. The question then arose whether W.'s estate was entitled to have the 3000*l.* raised and paid:—

Held, that upon the construction of the will and settlement and in the events which happened the wife's power of appointment among younger children had not been exercised in favour of W. and that his estate was not entitled to the 3000*l.*

Decision of Neville J., [1909] 1 Ch. 534, reversed.

Appeal from a decision of Neville J. (1)

This appeal, in the view taken by the Court of Appeal, raised no question of any legal interest, but turned solely upon the construction of the will and settlement referred to in the head-note. It therefore does not call for a detailed report.

(1) [1909] 1 Ch. 534.

C. A. 1909

STAWELL'S TRUSTS, *In re.* POOLE v. RIVERSDALE.

Butcher, *K.C.*, and *Dighton Pollock*, for the appellant, the defendant Esther Stawell Riversdale.

Jenkins, *K.C.*, and *Tindal-Robertson*, for the defendant Caroline Riversdale.

Peterson, *K.C.*, and *Carr*, for the mortgagees.

Church, for the trustees of the term.

The COURT (Cozens-Hardy M.R., Buckley and Kennedy LJJ.) allowed the appeal. In their Lordships' opinion the marriage settlement did not and was not intended to operate as an appointment by the wife; it could not at one and the same time be an instrument giving a power of appointment and an instrument exercising the power of appointment. The result of giving effect to the settlement in the manner proposed by Neville J. would be to enable the husband to appoint, and not the wife. Whatever W. took he took, in effect, under the appointment of his father, and that was not in accordance with the terms of the will. There must be a declaration that upon the construction of the will and of the settlement and of the mortgage and in the events which have happened the appellant, the daughter, is entitled to the whole 6000*l.* to be raised as portions for younger children.

Solicitors: *Pollock & Co.; Freke Palmer; Lawrence & Mavro; Eardley Holt, Lightly & Co.*

H. B. H.

C. A.
1909
June 10.

In re SYKES.
SYKES *v.* SYKES.

[1907 C. 9918.]

[LIVERPOOL DISTRICT REGISTRY.]

Will—Construction—Trustee and Cestui que Trust—Trustee making Profit out of Trust—Discretionary Trust to carry on Business—Licence to Trustees to exercise Powers under the Will notwithstanding Personal Interest—Sale of Goods to Business by Trustees at a Profit—Retention of Profit.

A testator carried on the business of a licensed victualler and also, in partnership with a brother, the business of a wine and spirit merchant, and in connection with his business of licensed victualler he purchased from the partnership business wines and spirits at prices below the market value of the goods. By his will he appointed his two brothers and his sister executors and trustees thereof and devised and bequeathed his residuary estate to his trustees upon trust to carry on his business of licensed victualler for a period not exceeding ten years from his death with all the powers in that behalf of absolute owners, and he declared that his trustees might exercise all powers and discretions thereby or by law given to them notwithstanding that they or any of them might have a personal interest in the mode or result of exercising such power or discretion.

The trustees carried on the testator's business of a licensed victualler under the terms of the will, and the wine and spirit business was continued by the two brothers, who supplied the testator's licensed houses with wines and spirits at a profit but at less than current market prices:—

Held, that the brothers were entitled to retain the profit arising from such supply by virtue of the special clause at the end of the will, but not upon the ground stated in *Smith* v *Langford*, (1840) 2 Beav. 362.

Per Cozens-Hardy M.R.: *Smith* v. *Langford* can no longer be treated as a binding authority.

Appeal from a decision of the Vice-Chancellor of the county palatine of Lancaster.

The testator in the action, John Gardner Sykes, carried on the business of a licensed victualler at Liverpool, and at the date of his death was the owner of a large number of fully-licensed houses in Liverpool and the neighbourhood. The testator also carried on, at first in partnership with his father and his brother, Thomas Bailey Sykes, and after his father's death in

C. A. 1909 — SYKES, *In re.* SYKES *v.* SYKES.

partnership with his said brother, the business of a wine and spirit merchant at Liverpool under the style of James Sykes & Co.

The testator in connection with his business of licensed victualler purchased at four months' credit wines and spirits from the firm of James Sykes & Co. at prices considerably below the market value of the goods for retailing in his licensed houses. The pricing of the goods supplied to the testator's licensed houses was regulated from time to time by the testator himself, and as the value of his business increased he from time to time reduced the rates of charge.

By his will dated June 24, 1897, the testator, therein described as "of Breck House Poulton le Fylde in the county of Lancaster wine and spirit merchant," appointed his brother Thomas Bailey Sykes, therein described as "of 13 Huskisson Street in the city of Liverpool wine and spirit merchant," his brother William Harold Harrison Sykes, therein described as "of 9 Curzon Park in the city of Chester wine and spirit merchant," and his sister, Ellen Porter Sykes, executors and trustees thereof. After bequeathing certain pecuniary and specific legacies the testator recited that he was carrying on the business of a licensed victualler and brewer at Liverpool and elsewhere and was the owner of sundry freehold, leasehold, and copyhold hereditaments and premises both in connection with his said business and otherwise, and that some of such hereditaments and premises were subject to certain mortgages or incumbrances, and he devised and bequeathed his real estate and the residue of his personal estate (including his said business) to his trustees "Upon trust for my trustees to carry on my said business of a licensed victualler and brewer for such a period not exceeding ten years from the date of my death as my trustees shall in their discretion think expedient with all the powers in that behalf of absolute owners and with power to continue in the said business such portion of my residuary estate as belongs thereto or is invested therein and to use such other portion of my residuary estate in the said business during the said period as my trustees shall in their absolute discretion think expedient" and subject thereto upon trust for sale and

conversion with a power of postponement. And the testator directed his trustees to hold his residuary estate, including the said business and the proceeds of the sale thereof, upon trust out of the net income thereof during the ten years next after his death to pay certain annuities, including annuities of 500*l.* each to the said T. B. Sykes, W. H. H. Sykes, and E. P. Sykes, and subject as aforesaid he authorized his trustees during the said period of ten years after his death to apply the remainder of the net income in discharging pro tanto any incumbrance affecting any portion of his residuary estate and directed them to invest the surplus income in accordance with the investment clause hereinafter contained. And from and after the expiration of the said period of ten years from the date of his death (thereinafter called the period of distribution of his residuary estate) the testator directed his trustees to hold his residuary estate upon trust to pay thereout certain pecuniary legacies, including legacies of 10,000*l.* each to the said T. B. Sykes, W. H. H. Sykes, and E. P. Sykes, and upon trust to divide the remainder between all his nephews and nieces and Harold P. D. Sykes. The testator then empowered his trustees in extension of the power conferred by the general law to invest any moneys liable to be invested under the provisions of the will in any mode of investment which might seem to them to be expedient, "without being responsible for any loss and as if they were absolute owners of such moneys," and after conferring upon his trustees extensive powers of management, &c., the testator proceeded as follows: "And I declare that my trustees may exercise or concur in exercising all powers and discretions hereby or by law given to them notwithstanding that they or any of them may have a direct or other personal interest in the mode or result of exercising such power or discretion." The testator further declared that no trustee of the will should be responsible for any loss arising from the carrying out of any of the trusts, powers, or provisions therein, or for any neglect or error of judgment or any other matter or thing done or omitted to be done in relation thereto, unless the trustee whom it was sought to make responsible for any such loss should have been fraudulent or personally dishonest.

On the same day, June 24, 1897, the testator made a codicil to

C. A. 1909

SYKES, *In re.* SYKES *v.* SYKES.

his will whereby he gave a legacy of 2000*l.* to Alice Beatrice Clarke, payable at the expiration of ten years from his death, and in the meantime an annuity of 80*l.*

The testator died on August 10, 1897, and his will and codicil were proved on October 30, 1897, by all the executors.

After the testator's death the business of James Sykes & Co. was carried on by T. B. Sykes, at first alone and afterwards in partnership with his brother W. H. H. Sykes. The trustees of the will carried on the testator's business of licensed victualler for a period of ten years from the date of the testator's death, and the firm of James Sykes & Co. continued to supply the testator's licensed houses with wines and spirits. The prices charged for the goods so supplied were somewhat in excess of those charged at the testator's death, but were still less than the current market prices.

At the date of the period of distribution the testator's estate was very largely indebted to the firm of James Sykes & Co. and others, and it appeared improbable that his estate would prove sufficient for the payment in full of the residuary legacies.

In 1907 two actions were brought by beneficiaries under the will and codicil for administration of the testator's estate, and by the judgment made in both actions, dated June 10, 1907, the first action in point of date was stayed, and the plaintiffs in the first action were made plaintiffs in the second action, and an inquiry was directed whether the defendants T. B. Sykes and W. H. H. Sykes received any and what profits in respect of goods supplied by them or their firm of James Sykes & Co. for the purpose of the testator's business of a licensed victualler, and whether such supplies were required for the purposes of such business and were furnished at the proper market prices.

On January 25, 1909, the trustees took out a summons in the second action to determine whether upon the true construction of the testator's will and in the events which had happened the defendants T. B. Sykes and W. H. H. Sykes as members of the firm of James Sykes & Co. were (during the period during which the testator's business of a licensed victualler was carried on by his trustees) as a matter of account with the said business

entitled to supply wines and spirits to the testator's licensed houses at the ordinary market price thereof.

The Vice-Chancellor, having regard to the terms of the will and to the case of *Smith* v. *Langford* (1), declared that the defendants T. B. Sykes and W. H. H. Sykes were entitled to supply wines and spirits to the said licensed houses and to charge the testator's estate the fair market prices thereof, but so that if they had charged the estate with less than the fair market prices they were not to be at liberty to increase the amounts actually charged.

The plaintiffs, the beneficiaries, appealed.

Upjohn, K.C., and *Courthope Wilson*, for the appellants. Trustees carrying on the testator's business under a discretionary trust in the will buy materials for the purposes of the business from two of their number who supply the goods at a profit. The question is whether under the clause at the end of the will the two can retain the profit. This clause, though not common form, is an ordinary form and is to be found in Davidson, 3rd ed. vol. iv. pp. 178, 301, and in Key and Elphinstone, 8th ed. vol. ii. p. 843. It is a rule of universal application that no one having fiduciary duties to discharge shall be allowed to enter into engagements in which he has or can have a personal interest conflicting or which possibly may conflict with the interests of those whom he is bound to protect: *Aberdeen Ry. Co.* v. *Blaikie Brothers* (2); *Broughton* v. *Broughton* (3); and this rule cannot be excluded except by some express or specific contract: *Moore* v. *Frowd* (4); *Crosskill* v. *Bower*. (5) This clause contains no clear reference to any transactions outside the will, and there is no ground for saying that it takes the case out of the general rule, which is a very salutary rule. The question is not whether the trustees have exercised a discretionary trust or power, but whether they are entitled to retain a profit. The clause has no application to a case of this sort, where the trustees in carrying on the business of the trust have certain moneys in

(1) 2 Beav. 362.
(2) (1854) 1 Macq. 461, 471.
(3) (1855) 5 D. M. & G. 160, 164.
(4) (1837) 3 My. & Cr. 45.
(5) (1863) 32 Beav. 86.

C. A. 1909 SYKES, *In re.* SYKES *v.* SYKES.

their hands belonging to the trust. The appellants are not seeking to set aside any purchase, but say that the trustees must pass on the goods at the price which they paid for them: *In re Williams.* (1) *Smith* v. *Langford* (2), assuming it to be rightly decided, has no application to this case, because there is no indication in this will that James Sykes & Co. should supply the business on any terms.

Jenkins, K.C., and *H. Mather*, for the respondents. This clause expressly ousts the principle that a trustee may not make a profit out of his trust. Breaches of trust are of two kinds—(1.) where the trustee exceeds his authority; (2.) where the trustee though acting within the letter of the trust is under some personal incapacity. Neither the trustee nor the Court has any power to go beyond the directions of the will or other instrument of trust, but in the other class of cases no question of jurisdiction arises, and if there had been no special clause in this will the Court might have sanctioned the trustees selling to themselves, e.g., in a case where it thought that the transaction would be beneficial to the trust, and in that case the trustees would have been entitled to retain the profits. The reason for going to the Court in such a case is not that the trustee is exceeding the authority of the trust, but that he cannot be judge in a case in which he is interested, and therefore he asks the Court to relieve him from that onus. But this clause expressly authorizes the trustees to decide in their own case. The power given by the will is to carry on the testator's business of a licensed victualler, which necessarily involves the power to buy wines and spirits, and the trustees are none the less exercising that power in buying from James Sykes & Co. The only objection to that was that two of the trustees were taking a benefit under the trust, but that is the very point aimed at by this clause. Inviting trustees to exercise a power notwithstanding their interest means exercising the power with all the natural consequences of exercising it. Further, upon the construction of the will, the intention of the testator was that the intimate connection between the two businesses should be continued, and upon the principle of *Smith* v. *Langford* (2) the trustees are entitled to charge the testator's

(1) [1892] W. N. 81; 40 W. R. 636. (2) 2 Beav. 362.

estate a fair profit for the goods supplied in the same way as was done in the testator's lifetime.

R. B. Lawrence, for creditors.

Upjohn, K.C., in reply.

COZENS-HARDY M.R. This is an appeal from a decision of the Vice-Chancellor, and it raises a point not by any means free from difficulty. The testator in this case was, and he described himself in his will as being, a wine and spirit merchant, and as also being a licensed victualler and brewer and the owner of sundry freehold, leasehold, and copyhold hereditaments and premises both in connection with his said business and otherwise. He appointed as his executors and trustees his two brothers, describing them as wine and spirit merchants, and a sister. He manifested on the face of his will a desire that his business of a licensed victualler should be carried on after his death by his trustees for a period of ten years. [His Lordship read the trust as to this, and continued:—]

The ultimate residue, which would be divisible at the end of the ten years, was given substantially in this shape—a sum of 10,000*l.* was given to each of the two brothers and to the sister, the three trustees, and the remainder was given to his nephews and nieces. Then comes a clause which has been called, and I venture to think most inaccurately called, a common form clause, but which I should prefer to call an extremely special and unusual clause, which never ought to be inserted in a will or other document by any draftsman without express directions from the testator. That clause is in these words: "I declare that my trustees may exercise or concur in exercising all powers and discretions hereby or by law given to them notwithstanding that they or any of them may have a direct or other personal interest in the mode or result of exercising such power or discretion."

The question for our decision arises in this way. The business was carried on to the end of ten years, which expired in 1907. Then questions arose between the residuary legatees and the trustees, and without prejudice to any question a certain inquiry was directed as to the profits which the trustees had made

C. A. 1909

SYKES, *In re.* SYKES *v.* SYKES.

Cozens-Hardy M.R.

in supplying goods to the testator's business, and also as to whether they supplied goods at fair market prices. It was obvious that that account, which must be very costly, might be rendered unnecessary, or at least greatly simplified, if the Court in the first instance decided the question of construction; therefore the trustees most prudently and properly took out a summons intending to raise the question (although I am not sure that it was very happily phrased) whether the trustees in this will were entitled to retain for themselves profits which were derived from the supplying, first by one of the two male trustees, and, next, by the two male trustees as partners, wines and spirits for the purposes of the testator's business which was being carried on under the trusts of this will. The business which has been since the death supplying the wines and spirits was a business of James Sykes & Co., a business in which the testator and one of the trustees, T. B. Sykes, were the sole partners—a partnership which, of course, expired on the death of the testator; and although that firm is not like a corporation which has a necessary continuity, one must have regard to this, that T. B. Sykes carried on the business for a time as James Sykes & Co., and then took in his other brother, W. H. H. Sykes, as a partner, and that they have since been the partners carrying on the business under the old style. Since the death of the testator, James Sykes & Co. have been supplying wines and spirits to the trustees of the will for the purpose of their carrying on the business which they were directed to carry on.

The question for our decision is whether they are entitled to retain for their own benefit and to keep in their own pockets the profits which they have derived from supplying to the business those wines and spirits. The Vice-Chancellor has held, or has intended to hold—I doubt whether his declaration really covers the question—that they are so entitled, and in my opinion the view which he has taken is correct. The discretionary trust to carry on the business of a licensed victualler vested by this will in these trustees clearly involved a power to buy what was necessary in the way of wines and spirits for the purpose of continuing the business; and I do not doubt for one

moment, and I hope nothing that falls from me will ever be held to indicate a doubt, that the main propositions upon which Mr. Upjohn relied are absolutely well founded and beyond question. If there had been nothing more than the trust to carry on the business, it is quite clear—it is too plain for argument—that the trustees could not have claimed to retain in their own pocket one penny of profit in respect of the goods which they supplied to the business. But then there is the very special clause which I have read, and I ask myself what meaning can be attributed to it? A special clause like this ought to have some application to what precedes it, and I think I am not going too far in saying that Mr. Upjohn has entirely failed to suggest any state of circumstances apparent on the face of this will to which this clause can have any application, unless it be the effect which has been given to it by the Vice-Chancellor.

The words of the clause seem to me exactly and precisely to fit the case of the dealings which have taken place since the testator's death between the trustees and the firm of James Sykes & Co.; and without in any way infringing upon the settled doctrines of the Court, I do find in this will a sufficiently clear indication of an intention that the trustees may buy wines and spirits from the firm of James Sykes & Co. notwithstanding that they have a direct personal interest in the result of such a purchase; and to say that they may do it but may not get a penny of profit from it would be, I think, really to lay a trap for the trustees, and not to deal with the will as we are entitled to and as we ought to in a case of this kind.

We are now only dealing with the question of construction. There is no bad faith or dishonesty suggested. I assume perfect good faith and perfect honesty on the part of the trustees. That being so, I am driven to the conclusion that the learned Vice-Chancellor was right in holding that they are entitled to retain this profit.

I ought perhaps to say that I am unable to follow one part of the reasoning of the learned Vice-Chancellor. I do not myself think that the case of *Smith* v. *Langford* (1) is an authority which

(1) 2 Beav. 362.

C. A. 1909 SYKES, *In re.* SYKES *v.* SYKES. Cozens-Hardy M.R.

can be relied upon as a guide in the future; and I do not myself think there is anything (if such inference could be properly drawn as was drawn in that case) which would assist Mr. Jenkins' client. But apart from that I think there is enough in this will to justify the Court in affirming the Vice-Chancellor's decision. The declaration of the Vice-Chancellor must, however, be amended by the addition of words shewing that the trustees are entitled to retain for their own use the profits derived from the supply of wines and spirits to the testator's business.

FARWELL L.J. I am of the same opinion. I regard the case as one of the construction of this particular will only, and although it has been pressed upon us that our decision is of general importance, I do not think that this clause can be regarded as common form simply because it is to be found in conveyancers' precedents. Ingenious and industrious conveyancers like the late Mr. Davidson and Sir Howard Elphinstone in the course of long and useful lives meet with all sorts of difficulties created by conflicting decisions and invent forms to meet the several difficulties as they arise and give the benefit of their industry and experience to the profession only to be used, of course with discretion, in proper cases. But the fact that a form is found in a precedent book possibly framed to meet a recent decision does not make it common form. In my opinion a clause of this kind, which is not a provision merely for administration, but is a provision altering the rights of the parties, ought not to be inserted either by counsel or by solicitor unless express instructions are given for the purpose by the client himself, and then it ought to be seen that the client understands it.

The Master of the Rolls has already pointed out the position in which the testator stood towards the trustees, his brothers, who are large beneficiaries under the will, whose children take portions of the residue, and with one of whom he had been carrying on business and associated in business. He directs those trustees to carry on his business of a licensed victualler in such manner as they think fit. So carrying it on they necessarily had to purchase liquors. They had therefore to choose from whom they would purchase them. They

could not, consistently with their own safety, purchase from themselves without making themselves liable to have the contracts thrown back on their hands if objected to before completion, or without accounting for the profits after the purchase had been completed, unless something was found in the will to meet the difficulty. The testator, having, as I say, in terms given these trustees who stood in this relation to him the power to choose from whom they should buy spirits, goes on to say that the trustees may exercise all powers and discretions, which include the power of carrying on the business and buying and selling from whom they will, notwithstanding that they or any of them have a direct or other personal interest in the mode or result of exercising such power or discretion. They have a direct personal interest. That is the objection taken to the transaction. The testator has foreseen that objection and has in terms said, in my opinion, that, notwithstanding that, the transaction is perfectly good. This is a mere question of construction. It is the construction of a will construed by the light of surrounding circumstances in the sense (to use a common phrase) that we may put ourselves in the testator's arm-chair. Reading this clause by the light of the surrounding circumstances I have no doubt as to its meaning.

KENNEDY L.J. It seems to me that in this case we have one matter to decide, and one only, and that is the application of this special clause (which on its face is one intended to give some protection to the trustees) to the particular facts upon which the present question has been raised for our judgment. I am not going to repeat that which has been said already by the other members of the Court. It appears to me that it is a question of considerable difficulty. Upon the whole it seems to me that the better view is that which has already received the sanction of the Master of the Rolls and Farwell L.J., who are more acquainted, of course, with questions of this kind than I am.

Solicitors: *Norris, Allens & Chapman, for Eskrigge & Roby, Liverpool; Bremner, Sons & Corlett, Liverpool; Simpson, North, Harley & Co., Liverpool.*

H. B. H.

C. A.
1909
June 14.

POWELL *v.* HEMSLEY.

[1908 P. 826.]

Restrictive Covenant—Freehold Building Land—Plans to be submitted—Construction of Covenant—Lease by Covenantor—Breach of Covenant by Lessee—Bankruptcy of Lessee—Re-entry by Covenantor—Liability of Covenantor for his Assigns—Past Breach.

The purchaser of part of a freehold building estate covenanted with the vendor for himself and his assigns to erect no other than private residences and to submit plans for approval before commencing to build. The purchaser granted a building lease with covenants similar to those in his conveyance; the lessees, without submitting plans for the vendor's approval, commenced a building which was alleged to be and was held a breach of the covenant. The lessees became bankrupt, and their trustee having disclaimed the lease, the purchaser took possession of the land and offending building. The vendor having sold the rest of the estate to the plaintiff with the benefit of the purchaser's covenants, the plaintiff brought an action against the purchaser to compel removal of the building, and for damages:—

Held, that there was no continuing breach, the covenant having been broken once for all when the building was erected contrary to it; that the breach was committed not by the purchaser, but by his lessees, and that he had not by his conduct rendered himself liable for the violation of the covenant; and that neither at law nor in equity was the plaintiff entitled to any relief.

Decision of Eve J., [1909] 1 Ch. 680, affirmed.

Dictum of Lopes L.J. in *Hall* v. *Ewin*, (1887) 37 Ch. D. 74, 82, queried.

Appeal from a decision of Eve J. (1)

The documents and facts are given in greater detail in the report of the case in the Court below, and the following summary is considered sufficient for the purposes of this report.

By a deed of conveyance dated June 24, 1904, of part of a building estate, the defendant, who was the purchaser, covenanted for himself, his executors, administrators, and assigns, with one Ball, his heirs, executors, administrators, and assigns, that he would (inter alia) erect on the piece of land thereby conveyed no buildings other than private residences (with suitable outbuildings to be erected in the rear thereof), and that he would

(1) [1909] 1 Ch. 680.

before the commencement of the erection of any building submit the plans thereof to Ball, his heirs and assigns, for his or their approval.

In November, 1904, Ball conveyed Lenton Hall, part of the land retained by him, to G. C. Bond in fee simple together with the benefit of the defendant's covenants contained in the conveyance of June 24, 1904.

In March, 1906, the defendant demised his land to W. Taylor and J. Fletcher for a term of 250 years subject to the stipulations and conditions in the conveyance of June 24, 1904; and the lessees entered into covenants with him as to building and submission of plans similar to those in the conveyance of June 24, 1904.

Taylor and Fletcher, the lessees, commenced to build on the demised land without having submitted plans to Bond or obtained his approval thereof, and they also erected an outside building containing a water closet, built on and attached to the front end of the house and not accessible from the inside of the house. The defendant had seen plans of the house and was cognisant of its erection. Bond took objection that the house was being erected in breach of covenant, and Taylor and Fletcher stopped building pending a settlement between them and Bond.

Before the dispute was settled Taylor and Fletcher were adjudicated bankrupt.

On June 8, 1907, the trustee in Taylor and Fletcher's bankruptcy served the defendant with notice of his intention to disclaim the lease of March, 1906, and in August following filed his disclaimer thereof, the defendant having in the meantime re-entered upon the demised land with the unfinished house upon it.

By a conveyance of July 6, 1907, Lenton Hall was conveyed by Bond to the plaintiff in fee simple together with the benefit of the defendant's covenants contained in the conveyance of June 24, 1904. The plaintiff thereupon approached the defendant with a view of getting the unfinished and unsightly buildings removed, and subsequently commenced this action, claiming an injunction to restrain the defendant from erecting or continuing to erect any building on the land in breach of the covenants in

C. A. 1909 — POWELL v. HEMSLEY.

the conveyance of June 24, 1904; an order directing the defendant forthwith to pull down and remove the buildings erected in breach of those covenants; and damages.

The plaintiff alleged that the value of Lenton Hall was seriously depreciated from the proximity of the unfinished and unsightly house which was visible from all the principal rooms of Lenton Hall.

Eve J. held that the breach of covenant was not a continuing breach, the covenant having been broken once for all when the house was erected; the breach was not committed by the defendant, and neither by contract nor by conduct was he liable for it, and he therefore dismissed the action with costs.

The plaintiff appealed.

P. O. Lawrence, K.C., and *Dighton Pollock*, for the appellant. Eve J. has already found as a fact that this house and erection near it were breaches of the covenants, but declined to hold the defendant liable; the defendant, however, is bound by this covenant and is liable for the act of his assigns. The covenant should be read doth hereby "for himself his executors administrators and assigns" covenant that "he his executors administrators and assigns" will not do certain acts; if read in this way, the defendant is liable for the acts of his assigns. The meaning and intention of the covenant is thus carried out; it was intended for the mutual protection of both parties. The breach, too, is a continuing breach for which a mandatory injunction can be granted. No buildings other than private residences of approved design are to be allowed on this property: *Webb* v. *Fagotti Brothers*. (1) The building, too, is unfinished; it is in course of erection, and until it is finished there is no completed breach. The covenant was one entered into for the benefit of the adjoining property, and is in substance a negative one, though apparently affirmative: *Metropolitan Electric Supply Co.* v. *Ginder*. (2) It necessarily infers a negative, and can be enforced by injunction, otherwise it is meaningless. The benefit of this covenant is assignable at law: *Fitzroy* v. *Cave*. (3)

(1) (1898) 79 L. T. 683. (2) [1901] 2 Ch. 799.
(3) [1905] 2 K. B. 364.

It is for the benefit of the person suing that he should enforce the covenant, and that fact takes the transaction clear of maintenance.

Further, independently of the question whether this covenant can be enforced at law, it can be enforced in equity on the doctrine of *Tulk* v. *Moxhay*. (1) The defendant's lessees committed this breach, and, under the circumstances proved at the trial, he must be taken to have been a party to the breach and to have assisted in committing the breach. In either case the defendant is liable in damages for the breach, and for that reason this case is distinguishable from *Hall* v. *Ewin* (2) ; and, besides, he is bound at law under the covenant, which was not the case in *Hall* v. *Ewin*. (2)

In *Gaskin* v. *Balls* (3) the Court would certainly have ordered the pulling down of the offending building had it not been for the acquiescence of the plaintiff. Here the plaintiff has from the first objected to this erection. Therefore either at law or in equity the plaintiff here is entitled to the relief claimed.

Jessel, K.C., and *Marcy*, for the defendant, were not called upon.

COZENS-HARDY M.R. This case has been very elaborately and ably argued by counsel for the appellant, but I cannot hold that Eve J. did wrong in dismissing the action. It is undoubtedly a curious case, because it all arises as a consequence of that remarkable provision of the Bankruptcy Act authorizing the trustee of a bankrupt lessee to disclaim the lease, which has the effect of the surrender of the property, and the landlord thereby becomes a compulsory and involuntary purchaser of the property which is so disclaimed. [Having stated the documents and facts, his Lordship continued:—]

Under these circumstances the plaintiff, the purchaser in July, 1907, of Lenton Hall, commenced this action against the defendant, seeking a mandatory injunction requiring the defendant to pull down this incomplete building, and, additionally or alternatively, damages for breach of the covenants. In my view the plaintiff is not entitled either to the injunction or to damages.

(1) (1848) 2 Ph. 774. (2) 37 Ch. D. 74.
(3) (1879) 13 Ch. D. 324.

C. A. 1909 — POWELL v. HEMSLEY. — Cozens-Hardy M.R.

The covenants entered into by the defendant with Bond are difficult to construe, but I propose, for the purpose of to-day, to assume, without deciding, that Mr. Lawrence is right in saying that notwithstanding some obscurity the covenant is a covenant by the defendant that he or his assigns will erect, and that we ought to read in "or his assigns" in every part of the covenant for the purpose of imposing an obligation upon the defendant himself. But what is the consequence of that? The consequence of that is that there was a breach of the covenant when Taylor and Fletcher, some time in the early part or middle of the year 1906, erected this incomplete building, which the learned judge has held to be an outbuilding, in breach of the covenant. But what right does that give the plaintiff to sue? The plaintiff is simply an assignee of the reversion of July, 1907; he has not got by his conveyance from Bond anything more than a conveyance of the property with the benefit of the defendant's covenants. He does not even purport to have an assignment of a right to damages for past breaches of the covenants by lessees. That seems to me, putting the covenant in the most favourable way for the appellant, to be a fatal answer to the claim for any relief on the covenant in point of law. What I have said about that applies also to the omission to furnish a plan of the buildings before erection. That also was a past breach. Then Mr. Lawrence, who has argued this case with great ability, seeks to say that this is not a case where the breach was a single breach complete before the assignment, but that it is a continuing breach, and that when the defendant covenanted that he or his assigns would build no other building except a dwarf wall, and would erect on the piece of land no buildings other than private residences, that that really meant will neither erect nor allow to remain erected. I think it would be altogether wrong for us to so construe the covenant. We are really being asked to construe a covenant which is affirmative in form as implying and involving a negative covenant for the purpose of invoking the jurisdiction of this Court which is limited to the case in which a defendant has expressly and clearly covenanted that a certain thing shall not be done. I therefore entirely decline to read the covenant in that way.

Then, lastly, it is said, although it is true that the defendant did not erect this building, and although it is true it was returned to him against his will, yet in the circumstances which are proved he must be taken to be assisting in, and to be a party to, the breach of covenant which was committed by Taylor and Fletcher. If it can be made out that a person who has not himself done the work has really been actively assisting and encouraging (by something more than words) the person who is the real wrong-doer to do what he has done, then I do not doubt that the arm of the Court is long enough to reach him. But I think the language of Lindley L.J. in *Hall* v. *Ewin* (1) is very applicable to this case: "The principle of *Tulk* v. *Moxhay* (2) rests on good sense, but it imposes a burden on the land, and when it is sought to extend the principle to a person who is doing nothing himself in violation of the covenants in the lease I do not think it ought to be so extended." I am aware that Lopes L.J. in his judgment in one passage uses words which seem to go further than that. He says this (3): "I can quite understand that if Ewin had let the house to McNeff with notice of the purpose for which it was to be used, an injunction might have been rightly granted." As to that I do not feel any doubt. Then he goes on, "or if it had been proved that he had seen the mode in which the premises were being used and had expressed his approval of it, in that case also an injunction would have been right." With great respect to the learned Lord Justice I doubt whether that proposition, which goes far further than anything to be found in the judgments of Cotton L.J. or Lindley L.J., can be readily maintained. I therefore am driven to the conclusion that the plaintiff has no right at common law to damages for breach of any covenant by the lessees, and I think also that the defendant, being in this matter simply in the position of an assignee of the lessees, is not liable to the peculiar though invaluable jurisdiction of the Court on the principle which is so often referred to as the *Tulk* v. *Moxhay* (2) principle, because he has not himself done anything in the matter, he has not in any way brought himself within the reason

(1) 37 Ch. D. 74, 81. (2) 2 Ph. 774.
(3) 37 Ch. D. 82.

C. A. 1909 POWELL v. HEMSLEY.

and the common sense of that doctrine. I therefore think that neither at law nor in equity is the plaintiff entitled to any relief, and that this appeal must be dismissed with costs.

FARWELL L.J. I agree with all the Master of the Rolls has said, and I have only one or two words to add. We must bear in mind that there are two rights asserted here, one a common law right, the other an equitable right. So far as regards the common law right there are some words in the conveyance which were not called to our attention which make it absolutely and abundantly plain to my mind. The conveyance is "together with the benefit of all the several covenants contained in the conveyance of June 24, 1904." It is quite plain that there is no attempt to assign the benefit of damages for past breaches, so it is unnecessary to consider whether it could legally be done or not. Then it becomes simply a question of the *Tulk* v. *Moxhay* (1) equity. In my opinion Eve J. was perfectly right in saying that this was governed by *Hall* v. *Ewin*. (2) If it had not been for the bankruptcy, the persons to have been attacked would have been the tenants, and if there had been a breach proved, they would have been hit by notice and would have been compelled to comply with the covenants. So far from the defendant assenting to any breach, he took the covenant from his lessees in terms to abide by and perform these very covenants, and I can see no ground whatever for saying he has done anything which could be construed as a breach by him of any of the covenants binding on him. I will not say anything about the construction of the covenant, because, although I personally have very little doubt as to the true construction, I will assume, as the Master of the Rolls has done, a construction in favour of Mr. Lawrence's client.

Then there only remains this proposition: Assume a breach of covenant by the lessees already in possession, they become bankrupt, and thereupon by the operation of the Bankruptcy Act, and by the disclaimer of the trustee in bankruptcy, the estate is thrown back upon the hands of the lessor. The lessor, as I have already pointed out, has himself been guilty of no

(1) 2 Ph. 774. (2) 37 Ch. D. 74.

breach and has done nothing for which he could be liable in law or equity. Can it be, because he has his estate thrown back upon him with a building upon it which ex hypothesi was erected in breach of the covenant, that he is thereby made liable to pull down the building so erected, but not by himself? I think the case of *Gaskin* v. *Balls* (1) is an authority to shew he is not, if authority were wanted, and except under very special circumstances I can hardly imagine a case in which the Court would feel compelled to hold an owner of land in such a case as that liable to pull down a building at all. The only other point argued was this. It was said this is a continuing breach. I agree with Eve J. that the case of *Doe* v. *Woodbridge* (2) illustrates the distinction very well. The covenant there was that the tenant should not alter or convert certain rooms into bedrooms. The Court held the conversion was a breach complete at once. I entirely agree with Eve J., and I think that this appeal should be dismissed with costs.

KENNEDY L.J. I agree, and have nothing to add.

Solicitors: *Busk, Mellor & Norris, for Powell & Jarvis, Newtown; Gribble, Oddie, Sinclair, Rowlatt & Johnson, for Arthur Barlow, Nottingham.*

(1) 13 Ch. D. 324. (2) (1829) 9 B. & C. 376.

W. C. D.

WARRINGTON J.

1909

June 18.

In re H.'S SETTLEMENT.

H. *v.* H. (1)

Ward of Court—Marriage in Contempt—Committal of Ward—Jurisdiction.

The Court has jurisdiction to commit a ward of Court to prison for contempt of Court, and will in a proper case exercise such jurisdiction.

Dictum of Cotton L.J. in *In re Leigh*, (1888) 40 Ch. D. 290, 294, applied.

By an indenture of settlement dated December 12, 1908, and made between E. P. H., the mother of the infant plaintiff, of the one part, and the defendant J. S. H. of the other part, E. P. H. declared that the defendant J. S. H. should invest a sum of 100*l.* which she had paid to him and stand possessed thereof in trust for the infant plaintiff absolutely.

On December 15, 1908, the writ in the present action was issued by the infant plaintiff by his mother as next friend against the defendant J. S. H. for the administration of the trusts of the settlement. The action was instituted in consequence of the disobedient and irregular conduct of the infant plaintiff.

The only property to which the infant plaintiff was entitled beyond the 100*l.* settled by the above settlement was certain reversionary and contingent interests in personal estate.

On January 18, 1909, Parker J. made an order sanctioning a scheme for the maintenance of the infant plaintiff and directing him to pursue his studies under certain tutors.

On May 25, 1909, the infant plaintiff married A. M. S., also an infant, without obtaining the leave of the Court or informing his mother or other relations. In giving the particulars for filling up the marriage register the infant plaintiff stated his age to be twenty-two years instead of seventeen years.

On June 10 the fact of his marriage was brought to the notice of Warrington J., who directed that the infant plaintiff should be arrested and kept in custody at his own flat until the following day.

On June 11 a motion was made on behalf of the infant plaintiff

(1) This case was heard in camera by Warrington J., but by the permission of the judge we are enabled to publish this report.

by his mother as next friend to commit the wife to prison for her contempt in procuring the ceremony of marriage to be solemnized between her and the infant plaintiff without the leave of the Court. The judge directed that the motion should stand over until June 14, and ordered that the clergyman who performed the ceremony, the two witnesses named in the marriage certificate, and J. S., therein named as the father of the bride, should attend before him on that day, and that until then the infant plaintiff should be kept in similar custody.

On June 14 the persons ordered to attend, and the parish clerk, who was not so ordered, attended before the judge and were examined. The short effect of their evidence was that none of the parties were aware that the infant plaintiff was an infant or that he was a ward of Court, and that neither the clergyman nor the clerk made any inquiries as to the truth of his statements as to his age or otherwise. J. S. stated that the first he heard of the matter was by a telegram on May 25 from his daughter informing him that she had that day been married.

Harman, for the infant plaintiff.

Warrington J., being of opinion that the infant plaintiff had been guilty of contempt of Court by marrying without the leave of the Court, ordered that he should stand committed to Brixton Prison for his contempt and that the governor of the prison should produce him in Court on June 18. The motion to commit the wife was directed to stand over until that day, and the wife was ordered to file an affidavit in the meantime explaining the circumstances under which she came to marry the infant plaintiff.

On June 18 the case came on again, and the wife having filed an affidavit was cross-examined upon it by counsel for the infant plaintiff.

Harman, for the infant plaintiff.

Colefax now appeared for the wife and apologized on her behalf to the Court for the contempt of Court committed by her, and he submitted that her evidence shewed that, although she

WARRINGTON J. 1909 H.'s SETTLEMENT, *In re.* H. *v.* H.

was aware that the infant plaintiff was under age, she had no knowledge that he was a ward of Court, and that in entering into the marriage she was not influenced by any monetary considerations.

WARRINGTON J. In this case I have thought it right, in the exercise of the jurisdiction which the Court possesses in reference to its wards, to commit the ward himself to prison, and I now proceed to state my reasons for so doing.

That the Court has jurisdiction to commit a ward for contempt is, I think, clear: see per Cotton L.J. in *In re Leigh* (1); but I have been unable to find any reported case in which such an order has been made. It is necessary to state the facts by which, in my opinion, the admittedly unusual order is justified.

The ward is not yet eighteen years of age. Until recently he was being educated for the Army. He gave so much trouble owing to his disregard of regulations, and in particular by staying away at night, that the tutor with whom he was then placed declined to keep him any longer. He had previously been strongly admonished by Parker J. as to his conduct. A new tutor was found for him, and the matter came before me early in May, when I gave directions that he should go to such new tutor. These directions he persistently neglected to obey. Last week it was discovered that he had been married on May 25. This marriage was celebrated in church after publication of banns for which the ward himself gave the instructions, falsely stating his age and giving a wrong address. He has a mother living and other relations. He kept his intention a secret from them, and I need not say did not ask the leave of the Court. He has been guilty of further serious misconduct, but as this has no reference to his position as a ward of Court, I merely mention the fact without going into particulars. It is enough to say that it is necessary for his own good that I should exercise as much control as possible over his actions. One result of his conduct is that it is no longer possible to send him into the Army, and a new career must be found for him.

On Thursday, June 10, hearing for the first time of his

(1) 40 Ch. D. 290, 294.

disobedience to my directions of May and of his marriage, and that it was feared he might leave England, I caused him to be arrested and kept in custody at his own residence until the following day, and on that day I directed him to be kept in similar custody until Monday, June 14. On that day I examined the clergyman, the parish clerk, the two witnesses to the marriage, and the girl's father. Nothing said by any of these persons caused me, to say the least of it, to take a more favourable view of his conduct than I had done before. I therefore made an order committing him to prison, and I did so for the following reasons: First, in a case such as this, where there are for practical purposes no funds being administered by the Court, the sole means which the Court has of enforcing its authority is by committal. If this means were never to be resorted to, the ward might disregard the orders of the Court with impunity. If ever there was a case in which it is right to resort to the ultimate sanction, this is, in my opinion, such a case. Secondly, I hoped and still hope that his committal to prison may be a salutary lesson to this boy and teach him that he, as well as the rest of us, must obey the orders of those who are in authority or run the risk of serious personal discomfort. Thirdly, it is in my opinion necessary, while some scheme for his future life is being devised, to keep him as far as possible out of mischief, and I can think of no means so effectual as that of keeping him in custody. Fourthly, the exercise of the jurisdiction to commit may give the Court effectual means of compelling compliance with the directions as to his future mode of life.

For these reasons I think the ward must remain in custody until some scheme can be devised for his future life, and I hope that the matter will be brought before me again at the earliest possible moment.

Besides having to deal with the ward I have an application before me to commit the wife. That has caused me considerable anxiety. (1.) I believe that she did not know that the infant was a ward of Court. (2.) It is admitted that she knew that he was only in his eighteenth year and that he had a mother and brother living, and that she took no steps to communicate with either of them before the marriage.

WARRINGTON J.
1909
H.'S SETTLEMENT, *In re.*
H. *v.* H.

Ignorance of the fact that a person is a ward of Court does not render a marriage with him any the less a contempt of Court. The wife here has undoubtedly committed a contempt of Court in marrying the ward. On the other hand, although that is so, yet no doubt the Court is entitled to and ought to take into consideration her ignorance of the fact that he was a ward of Court in determining whether it ought to resort to the punishment of imprisonment for contempt. I have done so, and I think I ought also to take into consideration the fact of her youth and that she did not expect to receive any sordid advantage from the marriage. Taking all those circumstances into account, I think I must refuse to commit her for contempt. Then as to the other parties brought before me, the clergyman, the parish clerk, and others, they did not in any sense contrive the marriage, and no order against them will be made.

Arrangements having been made as to the future of the ward, he was released from custody on Monday, June 21.

Solicitors: *Withers, Bensons, Birkett & Davies; Michael Abrahams, Sons & Co.*

W. I. C.

ATTORNEY-GENERAL *v.* GIBB.

PARKER J.

1909

May 5, 6, 7.

[1908 A. 1870.]

Local Government—Street—New Street—By-laws—Footway forming principal Access to Cottages—Width and Construction—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 157.

In making by-laws, and insisting on their observance, a local authority is entitled to consider what may happen in the future, when present conditions have been altered and the neighbourhood has developed, even although the present necessity for the by-laws may not be obvious.

The power to make by-laws, as regards new streets, given by s. 157 of the Public Health Act, 1875, is not confined to streets in the popular sense of the term, namely, roadways with houses on both sides of them, but applies to streets, as defined by s. 4 of the Act, which are proposed to be laid out and constructed for the first time.

The by-laws of an urban sanitary authority required every new street over 100 feet long to be so laid out that its width should be 36 feet at the least, and that it should be constructed for use as a carriage drive.

W., who was employed, as a builder, by G., the owner of land, to erect some cottages on the land of G., sent to the urban authority plans shewing an intended footpath, 202 feet long and 5 feet wide, affording the principal access to the cottages. The proposed footpath being objected to as not complying with the by-laws, W., without any authority from G., undertook that a roadway, 36 feet wide, should be made as soon as possession of sufficient land on the side further from the cottages to enable a road of the required width to be made could be obtained from a tenant whose tenancy could not be determined for some months. The plans, varied so as to shew a roadway 36 feet wide, were approved on the conditions of the undertaking. The cottages were then erected, and the footpath was levelled and surfaced with rubble and sand. It was 5 feet wide and bounded on the further side from the cottages by an ancient hedge, and on the nearer side by a fence in which were openings giving access to the cottages:—

Held, that the defendants had laid out and constructed a street within the meaning of the by-laws; that the by-laws were intra vires and reasonable; and that, although W., by reason of his having no control over the land, was not a proper party to the action, an injunction to enforce the obligations under the by-laws must be granted against G.

Shortly before May 22, 1906, the defendant Gibb purchased a piece of land with a frontage to Station Road, in the borough of Tenterden, with the intention of building cottages on it.

Part of the land, formerly known as "The Orchard," formed

PARKER J. 1909 ATTORNEY-GENERAL v. GIBB.

part of a Michaelmas agricultural tenancy, the tenant being a Mrs. Goodsall, and this land was at the end fronting Station Road. The time required to obtain the land from her was fourteen to sixteen months, twelve months' notice from the next Michaelmas being required to determine her tenancy.

On May 22, 1906, the defendant Weeks, the builder employed by Gibb, deposited with the local authority certain plans in duplicate shewing that two blocks of cottages were to be erected on Gibb's land, one of the blocks facing Station Road and the other being at the back, with approaches shewn on the plan, being a proposed footway, 5 or 6 feet wide, on either side of The Orchard.

On May 23 Weeks had an interview with the borough surveyor, who told him that the proposed footways would be a breach of the by-laws, as they were streets which were not of the required width of 36 feet.

Weeks, without obtaining instructions by Gibb, met the objection by saying that, as soon as the land could be obtained from Mrs. Goodsall, a roadway, including the site of the footpath on one side of the cottages, would be made of the required width of 36 feet. At the request of the surveyor, Weeks a few days afterwards sent in an amended rough plan shewing, instead of a footpath, a road 36 feet wide, occupying in part the site of the footpath; and the surveyor marked on the plan the width of the roadway, namely, 36 feet, and, after consulting the chairman of the roads committee of the borough council, told Weeks that the plans would be approved on the understanding that as soon as the necessary land could be obtained a 36 feet road would be made. This provisional consent was given in accordance with a practice necessitated by the infrequent meetings of the roads committee and the borough council.

Weeks was accordingly allowed to proceed with the building of the cottages, although there was no formal resolution approving the plans.

In accordance with the usual practice the surveyor returned one set of the plans with a stamp on it of the word "approved," with a blank for the date of approval and the signature of the approving council, but with a date filled in signifying the date

when the plans were returned to the builder, although not then approved.

On June 14, 1906, the roads committee approved the plans subject to the road being made, but to satisfy the chairman, who required something in writing to shew the understanding on which the approval was given, the surveyor obtained a letter from Weeks, dated June 15, 1906, stating that the plan would in due time be carried out, and would then give free access to the cottages, but that for their present use the paths would be made as shewn; and that Mrs. Goodsall's tenancy could not expire for sixteen months.

The letter was pinned to the plans as approved by the council on June 21, 1906. Gibb knew nothing of all this, although his attention, through his agent, Weeks, was called to the fact that the original plans could not be approved.

What the defendants did was as follows: On the right-hand side of the footpath, going from Station Road, there was an old agricultural hedge (which was allowed to remain), and at a distance of about 5 feet from the hedge a "spinal" fence, composed of stakes fastened together with wire, and containing openings giving entrance to five or six cottages, was erected. This fence ran for 202 feet down to Station Road, and was about 6 or 7 feet from the front of the cottages. The surface of this pathway, 5 feet wide, at the Station Road end, was levelled and altered for the convenience of passers by, and was covered with mortar and rubble, with sand on the top, so as to form the foundation of a footpath for the convenience of the cottages.

An action was brought by the Attorney-General at the relation of the mayor, aldermen, and burgesses of the borough of Tenterden, and by the relators, against Gibb and Weeks, alleging that the relators were the urban sanitary authority for the borough within the meaning of the Public Health Act, 1875, and that under and in accordance with that Act by-laws had been duly made and confirmed and were then and at the time of the happening of the events therein mentioned in force in the borough.

The by-laws relied on were made in pursuance of the Public Health Act, 1875, s. 157, and were as follows:

"3. Every person who shall lay out a new street shall lay out

PARKER J. 1909 ATTORNEY-GENERAL v. GIBB.

such street at such a level as will afford the easiest practical gradients throughout the entire length of such street for the purpose of securing easy and convenient means of communication with any other street or intended street with which such new street may be connected or may be intended to be connected and as will allow of compliance with the provisions of any statute or by-law in force within the district for the regulation of new streets and buildings.

"4. Every person who shall lay out a new street which shall be intended for use as a carriage road shall so lay out such street that the width thereof shall be 36 feet at the least.

"5. Every person who shall construct a new street which shall exceed 100 feet in length shall construct such street for use as a carriage road, and shall, as regards such street, comply with the requirements of every by-law relating to a new street intended for use as a carriage road.

"6. Every person who shall lay out a new street which shall be intended for use otherwise than as a carriage road, and shall not exceed in length 100 feet, shall so lay out such street that the width thereof shall be 24 feet at the least: Provided always, that this by-law shall not apply in any case where a new street shall not be intended to form the principal approach or means of access to any building, but shall be intended for use solely as a separate means of access to any premises for the purpose of removing therefrom the contents of the receptacle of any privy, or of any ashpit, or of any cesspool, without carrying such contents through any dwelling-house or public building, or any building in which any person may be or may be intended to be employed in any manufacture, trade, or business.

"7. Every person who shall construct a new street for use as a carriage road shall comply with the following requirements:—(*a*) He shall construct the carriage-way of such street so that the width thereof shall be 24 feet at the least . . . . (*c*) He shall construct on each side of such street a footway of a width not less than one-sixth of the entire width of such street . . . . "

New by-laws afterwards made by the corporation provided

that the by-law requiring every new street exceeding 100 feet in length to be constructed for use as a carriage road should not apply in any case where a new street should not be intended to form the principal approach or means of access to any building.

The relators alleged that the defendants had erected six houses on the land and had laid out a new street leading from Station Road across the land, and exceeding 100 feet in length, which new street formed and was intended to form the principal approach and means of access to the houses, and that in laying out such new street the defendants had refused and still refused to comply with the by-laws, and had constructed the same for use as a footpath only, and not as a carriage road, and of the width of only 6 feet.

The claims were (1.) a declaration that the defendants had laid out the new street in contravention of the by-laws by reason of the same not being of the prescribed width and not having been constructed as a carriage road, and (2.) a mandatory injunction or order requiring the defendants to widen the new street to a width of 36 feet and to construct the same for use as a carriage road.

Gibb by his defence denied that he, alone or with Weeks, had laid out or constructed a new street, and he further denied that such street (if any) formed or was intended to form the principal approach or means of approach to the cottages; and, in the alternative, he alleged that he was not in 1906, or at the time of pleading, in possession of any land on which a carriage road to the cottages could be laid out.

Weeks, in a separate defence, alleged that he had completed his contract to erect the cottages in October, 1906, and since then had had no connection with the property, and that he had no right or title to enter on the land or any adjoining land for any purpose whatsoever.

Both defendants also submitted that if the alleged offence under the by-laws had been committed, having regard to the delay in taking proceedings and the nature and circumstances of the case, the relief claimed ought not to be granted, and that in any event the case was not one for the intervention of the Attorney-General.

PARKER J.
1909
ATTORNEY-GENERAL v. GIBB.

A plea that the plaintiffs' claim to relief was barred by the Summary Jurisdiction Act, 1848, s. 11, was abandoned at the bar.

Macmorran, K.C., C. Fleetwood Pritchard, and *Naldrett,* for the plaintiffs. What the defendants have done is to lay out a "street" within the meaning of the by-laws. Such a passage as this is a street within the meaning of s. 4 of the Public Health Act, 1875, which provides that in the Act, if not inconsistent with the context, the word "street" shall include "any highway (not being a turnpike road), and any public bridge (not being a county bridge), and any road lane footway square court alley or passage whether a thoroughfare or not." Sect. 157 of the same Act empowers every urban authority to make by-laws "with respect to the level width and construction of new streets, and the provisions for the sewerage thereof"; and by-laws may be made as to the width of new streets: *Reg.* v. *Goole Local Board.* (1) Whether the case is looked at from the point of view of physical construction, or from that of erecting houses abutting on a highway, it is clear that the defendants have laid out and constructed a new street: *Devonport Corporation* v. *Tozer* (2); *Hendon Local Board* v. *Pounce.* (3) Gibb's contention that he cannot obtain land by means of which he could widen the approach is no defence, but at the outside only a ground for suspending the injunction until he can obtain possession of the necessary land. By-law 6 shews that streets not intended for traffic are dealt with. Sect. 11 of the Summary Jurisdiction Act, 1848, only applies to summary proceedings before justices of the peace: *Blackburn Corporation* v. *Sanderson.* (4)

Romer, K.C., and *W. Mackenzie,* for the defendants. Weeks is merely a builder, and not the owner of the land, and therefore has not laid out any street: *Sunderland Corporation* v. *Brown.* (5) A mandatory injunction against Gibb, enjoining him to turn the footpath into a metalled roadway 36 feet wide, cannot be granted. All the plaintiffs are entitled to, if they can claim anything, is that he shall be restrained from laying out a

(1) [1891] 2 Q. B. 212.
(2) [1903] 1 Ch. 759.
(3) (1889) 42 Ch. D. 602.
(4) [1902] 1 K. B. 794.
(5) (1880) 44 J. P. 831.

street of less width. The by-laws contain no such absurd requirement as that the denizens of these little cottages must be approached by a carriage road. Here the cottages are on only one side of the pathway, and there is, therefore, no such erection or defining boundaries on both sides as to constitute the laying out of a street: *Robinson* v. *Barton Local Board.* (1) Certainly no new street has been laid out or constructed: *Williams* v. *Powning* (2); *St. George's Local Board* v. *Ballard* (3); *Fellowes* v. *Sedgley Urban Council.* (4) The word "street" has different meanings in different sections of the Public Health Act, 1875, and the contention on the plaintiffs' part, that because a footway is or may be a street within s. 4 it must be a street within s. 157, cannot be acceded to. In *Reg.* v. *Goole Local Board* (5) the streets were defined passages with buildings on both sides of them. The by-laws do not touch the case of laying out a street which is not intended as a carriage road. The Court has a discretion as to whether an injunction against Gibb should be granted, and it is submitted that under the circumstances an injunction should not be granted against him. [They also cited *Attorney-General* v. *Rufford & Co., Ld.* (6) and *Metropolitan Board of Works* v. *Nathan.* (7)]

Macmorran, K.C., in reply. Sect. 4 of the Act enables by-laws to be made not only as regards cases where there was no street or road at all, and the owner intends to construct a street over vacant land, but also as regards a case where "that which originally was not, in ordinary parlance, a street . . . . has become such as to be a new street in the sense" to which he had referred, namely, a street in ordinary parlance: per Cotton L.J. in *Robinson* v. *Barton Local Board.* (8) Because what is already a street within s. 4 may become a new street within s. 157, it does not follow that the latter section only refers to streets in the popular sense. Something new has been made which is a street within the Act and the by-laws: *Walthamstow Urban*

(1) (1882) 21 Ch. D. 621; (1883) 8 App. Cas. 798.
(2) (1883) 48 L. T. 672.
(3) [1895] 1 Q. B. 702.
(4) (1906) 70 J. P. 412.
(5) [1891] 2 Q. B. 212.
(6) [1899] 1 Ch. 537.
(7) (1885) 54 L. T. 423.
(8) 21 Ch. D. 639, 640.

PARKER J. 1909 ATTORNEY-GENERAL v. GIBB.

Council v. *Sandell*. (1) Although Gibb cannot comply with the injunction until he obtains possession of more land, the injunction ought to be granted against him: *Attorney-General* v. *Ashborne Recreation Ground Co.* (2) The plaintiffs are also entitled to an injunction against Weeks, or at any rate to a declaration. [He also referred to *Pound* v. *Plumstead Board of Works*. (3)]

PARKER J. This case raises several questions, of which one is of some general interest, and arises on the true construction of s. 157 of the Public Health Act, 1875. That section empowers an urban authority to make by-laws, among other things, respecting the level, width, and construction of new streets; and by virtue of s. 4, the definition section of the Act, the word "street" is to include "any highway (not being a turnpike road), and any public bridge (not being a county bridge), and any road lane footway square court alley or passage whether a thoroughfare or not."

It has been held that to constitute a footway or lane a street it need not be dedicated to the public. It has also been held as regards the expression "new street," as that term is used in s. 157, that it is used there in the popular sense, and that a person may lay out a new street though the actual roadway was a street within the meaning of s. 4 before he did what was necessary to make it a new street. For example, it is possible to make an old road a new street by the erection of houses more or less continuous on one or both sides. It has been argued in the present case that those decisions, from which it appears that a street already a street within s. 4 may become a new street within s. 157 by reason of the acts of the adjoining owner, go further than that and decide that for all purposes a new street means a street in the popular sense, namely, a roadway with houses on either side. That is a question of general importance; for, if so, s. 157 would not empower a local authority to make by-laws respecting the level, width, and construction of what are not, in the popular sense, streets, but lanes, alleys,

(1) (1904) 68 J. P. 509. (2) [1903] 1 Ch. 101; 51 W. R. 125.
(3) (1871) L. R. 7 Q. B. 183.

or passages. In my opinion, having regard to the objects and construction of the Act of 1875, it could not have been the intention of the Legislature to confine the power to make by-laws to new streets in the broad popular sense of roadways with houses on either side. For it is equally important to an urban authority to be able to make by-laws respecting the roads within their district which are not intended, at least originally, to have houses on either side. This is clear having regard to their duties respecting lanes, passages, and alleys, possibly having drains under them, or which may have to be lighted at the expense of the local authority, or to which they may need to come for the removal of dust or refuse, apart from the necessity of obtaining access to extinguish fires, always an important matter from a public point of view. I do not think, after looking at the cases, especially the leading case of *Robinson* v. *Barton Local Board* (1), that there is any real foundation for the argument excluding anything but streets, in the popular sense, from the meaning of "new street" in s. 157. As I understand that decision and the decisions in other cases, all they amount to is that a thing which is a street within s. 4 may become a new street within s. 157. I do not think that any of the learned judges or noble lords really meant that when there was no street at all at the time in question, but a street was made for the first time which was a street within s. 4, but was not a street in the popular sense, that was not a street as to which there was power in the local authorities to make by-laws under s. 157. I think, therefore that in the present case the local authority had ample power to make by-laws respecting anything which was a street within s. 4 and was proposed to be newly made or laid out. The question is whether the local authority has done so, and, if so, whether the by-laws have been infringed. The by-laws are more or less in the model form of by-laws and include No. 3, respecting the level of new streets and their width, and No. 6. [His Lordship referred to the by-laws and read by-law 6, and continued :—]

That is important, because it shews that there may be a new street the sole object of which is the removal of refuse from

(1) 8 App. Cas. 798.

PARKER J. 1909 ATTORNEY-GENERAL v. GIBB.

buildings without going through them, and it follows that passages made in connection with buildings for this sole purpose come under the by-laws, and therefore within the by-laws a street is not confined to a street in the popular sense, and for a new street it is not necessary to lay out a roadway with buildings on either side. There is one other point on construction, namely, the difference between laying out and constructing. By-laws 4 and 6 deal with laying out, and 5 with constructing. If there is any real distinction between the two, it is argued that if a man lays out a street not intended to be used as a carriage-way, and more than 100 feet long, the by-laws do not provide for it, and it is a casus omissus. But I need not decide the point because on the facts I think that the defendants have not only laid out but constructed a street within the meaning of the by-laws. Having decided that the by-laws apply to any footpath or passage within s. 4, I find on the facts that the defendant Weeks, who is a builder at Tenterden, on May 22, 1906, deposited certain plans with the local authority shewing what he intended to do in or near a road called Station Road within the borough. The defendant Gibb had recently purchased a considerable amount of land with a frontage to that road, and the land with which he proposed to deal, as shewn by the plans, fronts Station Road and is at one end of the land which he had bought. It was formerly known as "The Orchard," and formed part of a Michaelmas agricultural tenancy, the tenant being a Mrs. Goodsall. The plans deposited shewed an intention to erect two blocks of cottages, of which one block containing four or five cottages was to face Station Road, and the other was to be erected some way back from Station Road, with the approaches shewn on the plan, being a proposed footpath on either side of the land known as "The Orchard" only 5 or 6 feet in width. Having deposited these plans, Weeks had an interview with Mr. Turner, the borough surveyor, on May 23. The surveyor then pointed out to him that he could not carry out the intention regarding roads shewn on the plan without committing a breach of the by-law; that he was in fact on the plans laying out a street or streets within the meaning of s. 4, and not of the width required by the by-laws.

The defendant Weeks, who is only a builder acting for the other defendant Gibb, took upon himself, without obtaining instructions, to meet the objection by saying that as soon as the land could be obtained from the tenant, Mrs. Goodsall, a roadway, including the site of the footpath passing on one side of the cottages, would be made of the required width, 36 feet. He was asked to amend the plan or send in a supplementary plan shewing a roadway of that width. Accordingly an amended rough plan was sent to the surveyor a few days afterwards, which shews, not a footpath passing by the cottages, but a road 36 feet wide, occupying in part the site of the footpath. After some discussion, the surveyor marked on the plan the width of which the roadway should be when completed, namely, 36 feet. The surveyor, after consulting the chairman of the roads committee of the borough council, told Weeks that his plans would be approved on the understanding that as soon as the land could be obtained for a 36 feet road the road would be made; so that as far as that was concerned it would comply with the by-laws. The time required to obtain the land was fourteen to sixteen months, twelve months' notice being required from the next Michaelmas to determine the tenancy. It appears to be the practice in the borough of Tenterden, where neither the roads committee nor the council itself meets frequently, but only at considerable intervals, for the surveyor and the chairman of the roads committee, if there is no reason why a building plan should not be approved, to give a provisional consent to it on the part of the council and allow the work to be commenced.

This was done in the present case. Weeks was allowed to proceed with the building of the cottages although there had been no formal resolution approving the plans. I hold on the evidence that Weeks was distinctly told that the plans were approved on condition that a roadway 36 feet wide was made as soon as the land could be obtained. It appears also that it is the practice of the surveyor, when he gives leave in that way for work to be proceeded with, to return one set of plans (which are originally delivered in duplicate), marked with a stamped word "approved," with blanks for the date and for the signature of the chairman of the meeting which approves

PARKER J. 1909 ATTORNEY-GENERAL v. GIBB.

the plan. By way of identifying the date when the plans are returned to the builder approved, he inserts the date when the plans are returned, though they have not then been approved. This does not seem to me a desirable practice, as it may possibly give rise to misconception by the owner or even the builder himself. That was done in the present case, and subsequently, after the buildings had been commenced, the matter came before the roads committee on June 14, 1906, and I think from their resolution that the plan was approved subject to the road being made; but the chairman of the committee desired something in writing to shew the understanding on which the plans were approved and the condition that the road should be made, and accordingly the surveyor again saw Weeks and asked him for a letter shewing the state of affairs and the condition in question, and so Weeks wrote the following letter of June 15, 1906: "The plan presented by me for the new building ground in the Station Road will in due time be carried out. It will then give free access to the cottages now in course of erection, but for their present use the paths will be made as shewn. Mrs. Goodsall's tenancy cannot expire for sixteen months." I think that "due time" in the letter meant sixteen months and would be understood as an assurance that the road would be made at the end of sixteen months, and that the necessary notice would be given in due course. It was so understood by the surveyor, the chairman of the roads committee, and the council meeting which approved the plans on June 21 or 22, the letter being pinned to the plans. I think it is clear from Gibb's evidence that he knew nothing of this, but it is equally clear that his attention, through his agent Weeks, was called to the fact that the original plans could not be approved; and it is equally clear that Weeks' assurances were given so as to obtain the consent of the council, and on the understanding that the breach of the by-laws was only temporary. If this were an action on an undertaking given by Gibb through Weeks, it would perhaps be a good defence that Weeks had no authority; but this is an action for the breach of a by-law, and it is reasonably clear that Weeks was the agent of Gibb for the purpose of discussing the plans with the surveyor and receiving notice that what was intended

was a breach of the by-law, and therefore what happened through Weeks, though not communicated to Gibb, is of no importance as a defence to the claim of the Attorney-General for an injunction against Gibb for breach of the by-laws. What has actually been done? It is reasonably clear from the plans and photographs. On the right-hand side of the footpath going from Station Road there was an old agricultural hedge, which still remains, and at a distance of 5 feet or thereabouts a fence was erected, which comes right down to Station Road and runs 202 feet away from Station Road. It is what is called a "spinal" fence, composed of stakes fastened together with wire and containing openings giving entrance to five or six cottages. There were 6 or 7 feet between the fence and this front of the cottages. In the result a pathway was formed from Station Road 202 feet long, with openings in the fence on the left-hand side to admit people to and from the cottages. The surface of the pathway at the Station Road end was levelled and altered for the convenience of passers by, and the surface was covered before the builder left the premises with mortar and rubble from the works, with sand on the top, to form the foundation of a footpath for the convenience of the cottages. Presumably each cottager has a right to go along this strip 5 feet wide. That was done, and was from the first intended to be done, and therefore the defendant Gibb has both laid out and constructed a footpath 5 feet wide and 202 feet long, forming a communication to the front of the cottages built according to the plan. If the footpath is a street within the meaning of the by-law the defendant Gibb has laid out and constructed a street, and he has not made it 36 feet wide, but only 5 feet, and he has not constructed a carriage-way 24 feet wide, and in this and other respects he has committed a breach of the by-laws.

It may be said that this is now such a trifling matter that an injunction should not be granted, but I think that in making and insisting on the observance of by-laws the local authority are entitled to consider what may happen in the future, and in the future various difficulties and ills to the neighbourhood may arise, since it appears doubtful whether the mere building on the side of the footpath would be converting it into a new street within

PARKER J.
1909
ATTORNEY-GENERAL v. GIBB.

the by-laws. By-laws similar to these existed in *Devonport Corporation* v. *Tozer* (1), and it was held that laying out and constructing meant doing something physical to the site of the street. If so, no one building on either side of the footpath would be laying out a street within the meaning of the by-laws, though possibly he might be doing so within the meaning of the Act. Even at the present time the narrowness of the footpath may inconvenience the local authority. They may want to remove dust, &c., and it may be better to approach the cottages by carts than on foot; and the drains of the cottages run down the footpath, and the local authority may have to execute repairs, and if there is a mere path, this may entail expenses on them which would not ensue if the path were of the width required by the by-laws. Therefore, quite apart from the true construction of the Act and the by-laws, it is a matter of some importance to local authorities that by-laws of this sort should be observed, even if the present necessity for them is not at first sight obvious. One must consider not only the present but future circumstances, in the interest of the public, when the conditions have become altered and the neighbourhood has become developed. I do not think, therefore, that the consideration of the hardship of requiring what is specified in the by-laws to be done at once is of much importance in considering whether an injunction should or should not be granted. It may be said that 36 feet is an unreasonable width for the principal access to six cottages; but I do not know, and is is not for me to enter on the consideration, of matters which were before the local authority when the by-law was framed, and I must consider simply whether the by-law is intra vires and not so unreasonable as to be void. In my opinion there is no reason for saying that a by-law respecting such a footpath as this is ultra vires, and there is nothing so unreasonable in the width specified as to justify me in saying that, as applied to a footpath approaching cottages like these, the by-law is so unreasonable as to be bad. I suppose that not only the parties concerned but the Local Government Board considered and approved the by-laws. Therefore Gibb, through Weeks his

(1) [1903] 1 Ch. 759.

agent, has broken the by-laws of the corporation respecting the laying out of new streets, and I think that on the information of the Attorney-General, who again has presumably looked into the matter and has thought it a proper case for the exercise of his authority on behalf of the Crown by granting his fiat, I ought not to refuse the ordinary relief by way of injunction against the laying out and constructing or allowing to continue laid out or constructed the footpath in front of the cottages without complying with the by-laws. It is not clear that this injunction would prevent Gibb from closing the footpath or removing it, there being access to the cottages from behind; but, if he did so, he would lay himself open to other proceedings by the Attorney-General in regard to the paths at the back, for, owing to an omission in the old by-laws, the provisions of the by-laws apply not only to the main means of access, but to all. That has been corrected in the new by-laws.

I propose, having regard specially to the tenants' interest, in granting the injunction to suspend its operation for eighteen months, giving time for Gibb to consider the matter and see whether some arrangement cannot be made with the corporation. I should have thought that counsel might have framed some sort of document providing for the ultimate construction of the 36 feet road, but not at the present time. However, I must leave that to negotiations between the parties. As to costs, the defendant Weeks at any rate, though really responsible for the defendant Gibb's mistake, is not a proper party to the action, since he has not control of the land. Both defendants appear by the same solicitors; but if I am to make a strict order I must dismiss the information with costs against Weeks and allow it with costs against Gibb.

Solicitors for plaintiffs: *Sharpe, Pritchard & Co., for J. M. Mace, Town Clerk, Tenterden.*

Solicitors for defendants: *Kingsford, Dorman & Co., for W. Cruttenden, Hastings.*

F. E.

NEVILLE J.
1909
June 10.

In re MAIR.
WILLIAMSON *v.* FRENCH.

[1909 M. 508.]

Will — Construction — Forfeiture — "Deprived of the personal enjoyment of income or any part thereof."

M. by will gave a fund to trustees upon trust to pay the income to F. "unless and until some event shall happen whereby if the same income belonged absolutely to her she would be deprived of the personal enjoyment thereof or of any part thereof." F. wrote to the acting trustee of the will, "I owe P. 260*l.* I have arranged to find her 100*l.* this week and I want you to pay direct to her the balance out of the next dividend due to me from the B. tea shares," part of the estate. Before the dividend became due F. paid off P. and withdrew the letter:—

Held, that there had been no forfeiture of her life interest.

Hugh Mair, who died in 1902, by his will gave his residuary real and personal estate to trustees upon trust for sale, conversion, and investment as therein mentioned, and to stand possessed of the investments upon trust to pay one third part of the income thereof "unto each of them my wife Emma Collinson Mair and my daughter Mary Cassandra French the wife of the Hon. Robert French during her life unless and until some event shall have happened or shall happen whereby if the same income belonged absolutely to her she would be deprived of the personal enjoyment thereof or of any part thereof," and in case of the failure or determination of the trust aforesaid upon the usual discretionary trusts with an ultimate trust as if the testator's wife or daughter were then dead, and on the death of either of them upon trust for the survivors or survivor of them and a named grandson.

On January 14, 1909, Mrs. Pritchard obtained judgment against Mrs. Robert French for the sum of 245*l.*, and on January 20 an order was made for Mrs. French's examination before a Master of the Court. On January 25 execution was levied in Mrs. French's rooms at an hotel, and on the same evening Mrs. Pritchard had an interview with Mrs. French and agreed to withdraw the execution on Mrs. French paying 100*l.* and writing

a letter to the trustees of her father's will asking them to pay the balance out of her next dividends if she did not first pay it herself. Mrs. French wrote and sent to the acting trustee the following letter:—

"Dear Mr. Williamson,—I owe Mrs. Pritchard the sum of 260*l.* I have arranged with her to find her 100*l.* this week and I want you to pay direct to her or to her representative the balance of 160*l.* out of the next dividend due to me from the Brahmapootra Tea shares.

"Yours very truly,

"(Signed) Mary C. French."

The Brahmapootra Tea shares were one of the investments under the testator's will.

In February, 1909, before any dividend had become due on the shares, Mrs. French paid the balance due to Mrs. Pritchard, and the letter was cancelled.

This summons was taken out by the trustees of the will for the determination whether the interest of Mrs. French in the income of the testator's residuary estate had determined by reason of the letter set out above.

Fawcus, for the summons.

Jenkins, K.C., and *T. T. Methold*, for Mrs. French. The letter was cancelled before any dividend was payable to Mrs. French, and therefore she was not deprived, and would not if she had been absolutely entitled have been deprived, of the personal enjoyment of the income.

In re Loftus-Otway (1), which was a case of an annulled bankruptcy, is an authority in our favour, though it was there held that there was a forfeiture, for the words were "would be deprived or be liable to be deprived," and Stirling J. decided the case wholly on the words "liable to be deprived," which are not present here. *In re Sheward* (2) is an authority that where a document is not intended to be a charge, and it would be a fraud on the borrower to treat it as a charge, it will not work a forfeiture. Here the letter was plainly not intended to be a charge.

(1) [1895] 2 Ch. 235. (2) [1893] 3 Ch. 502.

NEVILLE J. 1909 MAIR, *In re.* WILLIAMSON *v.* FRENCH.

J. G. Wood, for the testator's widow. In *In re Sheward* (1) no notice was given to the trustees of the fund; here that notice was given, and that is an act of which, as Stirling J. put it in *In re Loftus-Otway* (2), the necessary consequence is that Mrs. French would be deprived of the income. The case is quite undistinguishable from *In re Baker* (3), where it was held that a charge though cancelled created a forfeiture, and *Hurst* v. *Hurst* (4) is a strong authority to the same effect. The argument for Mrs. French requires the words "would be deprived" to be read as "shall be deprived."

NEVILLE J. I am of opinion that there has been no forfeiture in this case. I have to consider nothing but the words of the particular will before me and come to a conclusion whether any event has happened "whereby if the income belonged absolutely to Mrs. French she would be deprived of the personal enjoyment thereof or of any part thereof." [His Lordship stated the facts and read the letter above set out, and proceeded:—] I do not think other cases throw much light on that before me. The Court must look at the object of these forfeiture clauses. It cannot help knowing that the object is to preserve the life interest and nothing else. It may be that in some cases words are used which compel the Court to hold that a forfeiture has been incurred though the life interest has been preserved. There are no such words here. It was contended that the words "would be deprived" had that effect. But I do not think any reliance can be placed on the use of the word "would." The subjunctive mood was made necessary by the form of words used in the former part of the sentence. The lady has not in fact been deprived of any part of the income, nor would she have been so deprived if she had been the absolute owner thereof. I hold, therefore, that there has been no forfeiture. The costs of all parties may be paid out of the testator's general estate.

Solicitors: *Williamson, Hill & Co.; R. S. Taylor, Son & Humbert.*

(1) [1893] 3 Ch. 502.
(2) [1895] 2 Ch. 235.
(3) [1904] 1 Ch. 157.
(4) (1882) 21 Ch. D. 278.

J. R. B.

In re MAIDSTONE PALACE OF VARIETIES, LIMITED. NEVILLE J.
BLAIR *v.* MAIDSTONE PALACE OF VARIETIES, LIMITED. 1909
June 16.

[1908 M. 2478.]

Practice—Receiver—Interference with Possession of Receiver—Injunction—Proceedings in other Courts — Jurisdiction — Receiver in Debenture-holders' Action—Goods in possession of Company under Hire-purchase Agreement.

The M. Company were proprietors of a theatre and were supplied by the E. Company with certain electric plant under a hire-purchase agreement. The M. Company made default in payment of an instalment, and the E. Company brought an action in the King's Bench Division against the M. Company for the whole amount of the purchase-money. Pending this action a debenture-holders' action was brought in the Chancery Division and a receiver appointed. He went into possession and for a time carried on the theatre, using for that purpose the electric plant. Subsequently the E. Company obtained judgment in their action. After this the receiver sold the theatre to a new company, who purchased part of the plant, and the rest was returned to the E. Company. The E. Company claimed rent from the receiver for the use of their plant while he was carrying on the theatre, but refused to bring in a claim in the debenture-holders' action, and threatened proceedings in the King's Bench Division. The receiver applied by summons for an order that the E. Company should bring in their claim in the debenture-holders' action within seven days and be restrained from taking any proceedings to enforce it:—

Held, that this was a dispute as to the conduct of an officer of the Court in respect of which the Court was entitled to claim exclusive jurisdiction, and that it would not allow its own officer to be sued in another Court in respect of acts done in discharge of his office.

THIS was a summons taken out by the receiver appointed in a debenture-holders' action of all the property of the Maidstone Palace of Varieties, Limited. It asked that the Electric Power Hiring and Light Company might be ordered to formulate and bring before the Court within seven days and duly prosecute any claim which they might have against the receiver or against the assets of the defendant company to be distributed in the debenture-holders' action, and that the said Electric Company might be restrained from instituting proceedings against the receiver to enforce such claims.

It appeared that the Electric Company had supplied to the

NEVILLE J. 1909

MAIDSTONE PALACE OF VARIETIES, LIMITED, *In re.*

BLAIR *v.* MAIDSTONE PALACE OF VARIETIES, LIMITED.

Maidstone Company certain electric plant and machinery and fitted it up for them in a building called the Maidstone Hippodrome on a hire-purchase agreement. This agreement was dated March 4, 1908, and contained the usual provisions that the plant should remain the property of the Electric Company and the purchase-money should be paid by instalments recoverable as rent, and that if default was made in payment of any instalment the whole amount of all future instalments should become payable on demand. The Maidstone Company made default in payment of instalments, and on July 4, 1908, the Electric Company brought an action in the King's Bench Division against the Maidstone Company for the whole amount of the purchase-money and delivery up of the plant, and an order was made in this action giving the Maidstone Company leave to defend the action as to the whole claim on payment of 1500*l.* into Court, and in default it was ordered that the Electric Company should be at liberty to sign judgment for 1500*l.* and the Maidstone Company should be at liberty to defend as to the residue of the claim. No money was paid into Court, and on September 5, 1908, the Electric Company signed judgment for 1500*l.*

The debenture-holders' action was commenced on September 23, 1908, and the applicant was appointed receiver in this action on September 30, and immediately took possession, carried on the performances in the theatre, and in so doing used the plant in question.

On October 13, 1908, a receiver was appointed in the action in the King's Bench Division, but he did not attempt to take possession.

On November 28, 1908, the Electric Company obtained judgment in their action for the whole of their claim, which was 3413*l.* 11*s.* 9*d.*, and also for delivery up of the plant and an injunction restraining the Maidstone Company from removing, selling, charging, or otherwise in any way dealing with the plant. But on an application on behalf of the receiver in the debenture-holders' action, Jelf J., who granted the injunction, stated that he was not aware that the plant was in possession of an officer of the Court and that the injunction was not intended to apply to him.

There was a long correspondence, in which the Electric

Company claimed from the receiver rent for the use of their plant at the rate of 57*l.* a month from the date of his appointment, that being the amount of the rent or instalments payable under the hire-purchase agreement. The Electric Company refused to bring in a claim in the debenture-holders' action, and threatened proceedings in the King's Bench Division, but refused to commence them at once or to state what proceedings they would take.

In March, 1909, the theatre was sold. The purchasers bought a part of the plant in question from the Electric Company, and the rest was returned to them. This summons was taken out on May 8.

Van Neck, for the summons. The receiver is not responsible to the Electric Company for any payment for the use of this plant: *Hand* v. *Blow*. (1) That was a case of mortgage by demise of leaseholds, but it applies to the case of a payment in the nature of rent under a contract. The claim is really one to be paid twice over, for the Electric Company have recovered judgment against the Maidstone Company for the full amount of the instalments payable under their agreement. *Aston* v. *Heron* (2) shews that the Court can and will enforce exclusive jurisdiction where the conduct of its officer is complained of.

[NEVILLE J. I cannot restrain proceedings against the company.]

I only ask for an injunction to restrain proceedings against the receiver.

David, for the respondents. The receiver was appointed receiver only of the property comprised in the debentures; the plant in question was never the property of the Maidstone Company and was not included in the debentures, and the receiver was not the receiver of the plant. His use of it is a mere trespass, quite outside his office, and this Court has no jurisdiction to prevent the Electric Company from taking proceedings according to their common law right.

[NEVILLE J. Mr. Van Neck, can I restrain proceedings in another Court since the Judicature Act?]

(1) [1901] 2 Ch. 721. (2) (1834) 2 My. & K. 390.

NEVILLE J.
1909
MAIDSTONE PALACE OF VARIETIES, LIMITED, *In re.*
BLAIR *v.* MAIDSTONE PALACE OF VARIETIES, LIMITED.

Van Neck. *Hart* v. *Hart* (1), and *Besant* v. *Wood* (2), there cited, are clear authorities that the Court can restrain the commencement of proceedings, though it cannot restrain pending proceedings.

NEVILLE J. In this case the applicant is a receiver appointed by this Court in a debenture-holders' action, and by virtue of that appointment he has had the management of the theatre known as the Maidstone Palace of Varieties. In the course of that management he made use of certain plant which is claimed by the respondent company as their property. They say that he had no right to use it except on the terms of paying them a rent, and they claim a considerable sum. It appears to me that a dispute of that kind is one which, as is shewn by *Aston* v. *Heron* (3), the Court will deal with itself, and that it will not allow its officer to be subject to an action in another Court with reference to his conduct in the discharge of the duties of his office, whether right or wrong. The proper remedy for any one aggrieved by his conduct is to apply to this Court in the action in which he was appointed. If any wrong has been done by the officer, the Court will no doubt see that justice is done, but no one has a right to sue such an officer in another Court without the sanction of this Court. The present application is accordingly right in form. The respondents must therefore bring in their claim in the debenture-holders' action within fourteen days, and must be restrained from commencing any other proceedings against the receiver.

Solicitors: *Edmonds & Co.*; *J. Scott Duckers.*

(1) (1881) 18 Ch. D. 670, 680. (2) (1879) 12 Ch. D. 605, 630.
(3) 2 My. & K. 390.

J. R. B.

WILD *v.* WOOLWICH BOROUGH COUNCIL.

EVE J.

1909

May 19, 20, 25, 26.

[1908 W. 1339.]

Local Government—Compulsory Purchase—Street—Widening—Notice to Treat—Withdrawal—Compensation—Michael Angelo Taylor's Act (57 *Geo.* 3, *c. xxix.*), *s.* 80.

The service of a notice to treat, by a local authority upon a landowner, under the compulsory powers of Michael Angelo Taylor's Act, in order to acquire property for the purpose of widening a street, does, for some purposes, create the relationship of vendor and purchaser between the parties; and one of the consequences which follows from such relationship is that the subject-matter of the contract is thereby settled. The landowner must either treat the notice as a contract to purchase the lands as a whole or repudiate it; he cannot accept it in part and repudiate it in part.

Where a landowner has repudiated the validity of a notice to treat, the local authority giving the notice is entitled to withdraw it altogether, and cannot be compelled to proceed with that part of it which is acceptable to the landowner.

In such a case no compensation by way of damages will be given to the landowner.

WITNESS ACTION.

The plaintiffs were the trustees of the will of John Bowater, who died in 1810, and as such were seised in fee of certain lands and hereditaments in the parish of Woolwich, subject, as to certain parts thereof, to various leases and tenancies. The trusts of the testator's estate were being administered in the Chancery Division of the High Court in an action entitled *Hopkinson* v. *Powis*, and the estate was now in the possession of a receiver appointed in that action.

In 1906 the Woolwich Borough Council determined to proceed with the widening of a street known as Artillery Place within their borough, and in order to do this it was necessary to acquire from the Bowater trustees some of their property which abutted on the side of Artillery Place. The trustees, however, had no power of sale. Accordingly the borough council, in pursuance of their statutory powers under Michael Angelo Taylor's Act, 1817 (57 Geo. 3, c. xxix.), through the town clerk, Arthur B. Bryceson, served a notice to treat on the

EVE J.
1909
WILD
v.
WOOLWICH
BOROUGH
COUNCIL.

Bowater trustees on May 10, 1906. This notice stated that the council had adjudged that so much of the land, buildings, and hereditaments as lay between Artillery Place on the south side and a red line shewn upon a plan on the north side projected into, obstructed, and prevented the council from widening the said street, and that the possession and purchase of the specified portion of such land, buildings, and hereditaments was necessary for the purpose of the widening. The portion specified in this notice was a narrow strip of the frontages of the houses, being Nos. 36 to 38, 40 to 44, 45 to 51, and 52 to 60, facing into Artillery Place, and the Queen Victoria public-house, No. 61, at the east end. A street called Belford Grove ran into Artillery Place from the north-west between Nos. 51 and 52, thus leaving Nos. 52 to 61 to the east of Belford Grove. The trustees felt that it was impolitic and, indeed, impossible for them to comply with this notice, as it involved the transfer to the borough council of a portion of a certain part of their property, and would leave on their hands a narrow strip which would be wholly useless to them. They accordingly intimated to the advisers of the borough council that the notice was unsatisfactory, and they required the whole of the houses Nos. 52 to 61 inclusive in Artillery Place to be taken. A correspondence followed. The trustees pointed out that as to the houses Nos. 36 to 51 in Artillery Place they were merely the freehold reversioners, as the houses were subject to leasehold interests of varying lengths, and they desired to know if the council were going to acquire these leasehold interests. The town clerk informed the plaintiffs' solicitors that it was not the intention of the council to acquire these leasehold interests, but to wait until the leases expired. Subsequently, in a letter of November 13, 1906, the town clerk stated that the council proposed to accede to the plaintiffs' request and take the whole of the premises to the east of Belford Grove, namely, Nos. 52 to 61 in Artillery Place, in respect of which there were no outstanding leasehold interests, but the council proposed to take only the trustees' interest in the remainder of the houses to the west of Belford Grove, Nos. 36 to 51 in Artillery Place. In reply to this letter the plaintiffs' solicitors wrote a letter of

November 21, 1906, as follows: "Our clients have now had an opportunity of considering your letter of the 13th instant, and whilst they are agreeable to the acquisition by your council of the whole of their interest in the houses Nos. 52 to 61, subject to a satisfactory settlement being arrived at as to the amount to be paid, they do not agree with the method by which you propose to proceed with regard to the other frontages, and they therefore instruct us to say that in consequence of your council's declared intention, as shewn by your said letter of the 13th instant, of acquiring only their interest in the houses Nos. 36 to 38, 40 to 44, and 46 to 51 (inclusive) at the present time, and not acquiring the leasehold interests, they intend to take proceedings against your council to restrain them by injunction from adopting this method under the notice to treat." The matter remained in abeyance until September 4, 1907, when a meeting took place between the town clerk and a representative of the trustees; and as a result two fresh notices were served under Michael Angelo Taylor's Act. Both notices were served on October 9, 1907, by the defendant council upon the trustees, the first being a notice for the purchase of the whole of the houses fronting on Artillery Place, both east and west of Belford Grove, and the land in the rear of the houses, and not merely the strip of frontage as in the notice of May 10, 1906. The second notice of October 9, 1907, was in respect of two cottages, Nos. 1 and 2, Shipman's Cottages, situated in the rear of No. 51, Artillery Place, and fronting on Belford Grove. On January 9, 1908, the plaintiffs' solicitors wrote objecting to the council's proceeding with these two notices to treat of October 9, 1907, so far as regarded the lands and houses situated west of Belford Grove and north of Artillery Place, because they alleged that the council were attempting to acquire more land than was necessary for the proposed widening, and also because the council did not intend to acquire the leasehold interests in such of the plaintiffs' lands as were subject thereto. They intimated that they were prepared to treat the notices as valid and effectual upon two conditions, (1.) that the amount of land taken to the west of Belford Grove should be limited to a defined strip, and (2.) that the council would undertake to issue notices for the acquisition

EVE J.
1909
WILD
v.
WOOLWICH
BOROUGH
COUNCIL.

of the leasehold interests, but that, if assurances were not given on these points, the trustees would apply to the Court for an injunction to restrain the council from proceeding with their notices of October 9, 1907, except on the terms mentioned. In reply the town clerk, on January 24, 1908, wrote saying that he was instructed to inform them that the council had considered the letter of January 9, 1908, and had decided to withdraw the notices of October, 1907, and he thereby withdrew them.

By their statement of claim the plaintiffs submitted that by virtue of the notice to treat of May 10, 1906, and the ensuing correspondence there was a binding agreement on the defendants' part to proceed with the acquisition of all the interests in all the properties comprised in that notice, and to acquire the whole of the lands and hereditaments Nos. 52 to 61, Artillery Place. The plaintiffs claimed a declaration that it was not competent for the defendants, without the plaintiffs' consent, to withdraw the notice to treat of October 9, 1907, as regards the lands in Artillery Place; in the alternative, a declaration that even if it were competent for the defendants to withdraw such notice, such withdrawal operated to revive the notice of May 10, 1906, which was capable of being proceeded with; and the plaintiffs further claimed that in any event the defendants were not entitled to withdraw any of the three notices without making to the plaintiffs full compensation for all costs, charges and expenses, loss and damage incurred in consequence of the service of such notices.

Macmorran, K.C., Jessel, K.C., and *R. J. Quin*, for the plaintiffs. Under Michael Angelo Taylor's Act local authorities are entitled to adjudicate that part only of a house is necessary for the purpose of widening a street, subject to the owner's right to require them to take all where the house would be destroyed; and they are entitled to adjudicate that the whole house is necessary, subject to the owner's right to retain part, unless the part retained would be useless as a house: *Gard* v. *London Commissioners of Sewers* (1); *Teuliere* v. *Vestry of St. Mary Abbotts, Kensington* (2); *Gordon* v. *Vestry of St. Mary*

(1) (1885) 28 Ch. D. 486. (2) (1885) 30 Ch. D. 642.

Abbotts, Kensington (1); *Aldis* v. *London Corporation* (2); *Gibbon* v. *Paddington Vestry* (3); *Pescod* v. *Westminster Corporation* (4); *J. L. Denman & Co., Ld.* v. *Westminster Corporation.* (5) Assuming that the notice was good so far as regards the frontages, we submit that it cannot be withdrawn. When once a notice is given it has the effect of a contract of purchase, and those who give it are bound by it: per Cockburn C.J. in *Birch* v. *Vestry of St. Marylebone* (6); *Rex* v. *Hungerford Market Co.* (7); *Tawney* v. *Lynn and Ely Ry. Co.* (8); *Steele* v. *Liverpool Corporation.* (9)

We submit that the plaintiffs are entitled to hold the defendants to the notice subject to the conditions above mentioned, and that those conditions do not entitle the defendants to withdraw; and that if they withdraw they can only do so on terms that they must pay damages or compensation for the loss sustained by the plaintiffs. That an owner may be entitled to such compensation appears from Romer L.J.'s observations in *Davis* v. *Witney Urban Council* (10) and was also hinted at in *Rex* v. *Hungerford Market Co.* (7) The only power of the defendants is to acquire land to be used for the purpose of widening streets, and that does not entitle them to acquire a partial interest now, and wait thirty or forty years before they use it.

P. O. Lawrence, K.C., C. A. Russell, K.C., and *H. Courthope-Munroe*, for the defendants. We submit that the defendants were entitled to withdraw the notice: *Ashton Vale Iron Co.* v. *Bristol Corporation* (11); *In re Uxbridge and Rickmansworth Ry. Co.* (12) The notice to treat is one entire notice in respect of the whole of the matters comprised in it and cannot be severed. If one part of it is bad the whole notice is bad: *Ecclesiastical Commissioners* v. *London Commissioners of Sewers* (13); *Thompson* v. *Hammersmith Corporation* (14); *J. L. Denman & Co., Ld.* v. *Westminster Corporation.* (5) If a notice to treat is given, and

(1) [1894] 2 Q. B. 742.
(2) [1899] 2 Ch. 169.
(3) [1900] 2 Ch. 794.
(4) [1905] 2 Ch. 475.
(5) [1906] 1 Ch. 464.
(6) (1869) 20 L. T. 697, 700.
(7) (1832) 4 B. & Ad. 327.
(8) (1847) 16 L. J. (Ch.) 282.
(9) (1866) 7 B. & S. 261.
(10) (1899) 15 Times L. R. 275, 276.
(11) (1901) 83 L. T. 694.
(12) (1890) 43 Ch. D. 536.
(13) (1880) 14 Ch. D. 305.
(14) [1906] 1 Ch. 299.

EVE J.
1909
WILD
v.
WOOLWICH
BOROUGH
COUNCIL.

the recipient raises no objection to the legality of it, then he can compel the authority giving the notice to proceed, but if the recipient says that the notice goes beyond the power of those giving it, then the authority cannot be called upon to proceed. Their proper course is to withdraw the notice. The borough council were therefore entitled to withdraw their notices, and there are now none before the Court which can be enforced. As there has been no breach of contract, and no tort, there is no liability upon the council to pay any compensation or damages.

Macmorran, K.C., in reply. The notice to treat itself constitutes a contract between the parties; at any rate there is what is termed a quasi-contract in Fry on Specific Performance, 4th ed. s. 132. In *Haynes* v. *Haynes* (1) Kindersley V.-C. states that for certain purposes the notice to treat does constitute the relation of vendor and purchaser as between the landowner and a company. In *Mercer* v. *Liverpool, St. Helens, and South Lancashire Ry. Co.* (2) that statement is adopted. The notice of May 10, 1906, was good on the face of it, and when the other notices of October 9, 1907, were withdrawn it was revived. If the council are held to be entitled to withdraw their notices, it has resulted in damage to us from being hampered in the use of our property.

EVE J., after stating the facts and the effect of the correspondence down to the letter of January 9, 1908, continued:—In that position of affairs, what were the council to do? They could have written back and said "We are going to enforce the notices; we are going to take the steps which follow on the giving of the notices, and we propose to do so unless you take proceedings to restrain us"; and had they done so, and had the plaintiffs then carried out their threat and issued their writ, I apprehend that it would have been perfectly competent for the council to say, as soon as the writ was served upon them, "We submit to the injunction, and we will pay your costs"; and obviously the result of that would have been to put an end to the notices. The council were advised that such might be the result of litigation. What was there then to prevent them saying "If you assert that the notice is bad, and if you say

(1) (1861) 1 Dr. & Sm. 426, 450. (2) [1903] 1 K. B. 652, 661.

you are not going to allow us to enforce it, but are going to institute proceedings to prevent us, we, without putting you to that expense and that trouble, will at once accept your view of the position and put an end to the notice and to the relationship which has been brought about by the service of that notice"? When one appreciates the relative positions of the council and the plaintiffs, it was, I think, quite competent for the council to do, without the actual commencement of litigation, that which they undoubtedly could have done as soon as the litigation had in fact been commenced. But it is said that does not amount to an acceptance of the plaintiffs' views, because the plaintiffs' views were not that the notice was in its entirety bad, but that it was only in part bad, and that at least the council ought to be held to the notice in so far as it was acceptable to the plaintiffs, and ought only to be restrained from giving effect to so much of the notice as the plaintiffs alleged to be bad.

The determination of that question depends upon the relationship brought about between these parties by the service of the notice to treat. In the first place it involves this question: Can one split up a notice to treat of this sort and say it is a notice to treat in respect of every tenement or every separate plot of land which is mentioned in it or affected by it? Can one say that this is a notice to treat in respect of the tenements on the east of Belford Grove, and good as to that, and that it is also a notice to treat in respect of the tenements to the west of Belford Grove, good in part as to that, but bad as to the residue, and that the position of the landowner receiving such a notice entitles him to insist upon so much of the notice as is good, and to repudiate so much of it as is bad? In order to answer that question, one must consider what is the legal position brought about by the service of the notice to treat. I accept the statement of the law in *Haynes* v. *Haynes* (1) as restated by Stirling L.J. in the later case of *Mercer* v. *Liverpool, St. Helens, and South Lancashire Ry. Co.* (2) But what is the statement of law there? It is this: that the notice to treat does not constitute a contract, although to a certain extent and for certain purposes it creates the relationship of vendor and purchaser, and although some of the consequences

(1) 1 Dr. & Sm. 426. (2) [1903] 1 K. B. 652, 661.

EVE J.
1909
WILD
v.
WOOLWICH
BOROUGH
COUNCIL.

which flow from a contract of sale and purchase follow upon the notice to treat: on the other hand, some of the consequences which would follow from an ordinary contract between vendor and purchaser do not flow from the relationship brought about by a notice to treat; and yet again some consequences follow upon a notice to treat which would not follow from the ordinary relationship arising from a contract of sale and purchase.

What is one of the consequences which all the Courts seem to agree upon as following from the notice to treat? It is this, that the subject-matter of the contract is thereby settled. The very passage in *Haynes* v. *Haynes* (1) upon which the plaintiffs rely contains this observation, quoted I think from *Adams* v. *London and Blackwall Ry. Co.* (2): "Some of the consequences which flow from an actual contract also follow upon the notice to treat; such as that the particular lands which the company are to take, and which the landowner must give up to the company after certain steps prescribed by the Act shall have been taken, are fixed, and that neither party can get rid of the obligation, the one to take and the other to give up the lands specified in the notice"; so that in fact the notice to treat operates as a contract to this extent, that it is a contract dealing with the particular lands referred to therein, and it is not competent for the landowner to accept the notice as to some of the lands and treat them as bound by it, and to repudiate the notice as to other lands and treat them as not bound by it. He must either treat the notice as a contract to purchase the lands comprised in it as a whole, or he must repudiate it, and if in fact he does repudiate it, then it is open to the promoters to accept his repudiation and to withdraw and put an end to the notice. The landowner cannot be heard to say "I hold to the contract," and at the same time "I repudiate it"; and if in fact his case is that the notice is bad, he is not, I think, entitled to come to the Court alleging the notice to be bad, asking to amend it, and then seek on the amended notice to impose upon the public authority a contract which they never contemplated, and which does not embody the subject-matter or bring about the relationship which was intended when the notice to

(1) 1 Dr. & Sm. 450. (2) (1850) 2 Mac. & G. 118.

treat was served. I think in this case after the receipt of the letter of January 9, 1908, obviously and in terms a repudiation of the contract, so far as regards subject-matter, it was quite open to the authority, without waiting for litigation, to say "We withdraw it; you wish to treat this particular contract, affecting this subject-matter, as at an end; we accede to your wish, and we withdraw it."

That does not conclude the matter, because it is said that if the notices of October 9, 1907, are treated as notices not in fact superseding, but only as alternative notices to the notice of May 10, 1906, the withdrawal of the proposed substituted notices operates to revive the old notice of May 10, 1906. I am not at all sure that the true result of the correspondence and of the negotiations which took place is not this, that the notices of October were intended by all parties to supersede the notice of May; but I will not determine that against the plaintiffs, and I will assume that it was only an attempt to supersede the notice of May by the subsequent notices of October, and that, when that attempt failed, the parties were relegated to the position which they would have occupied had the notice of May 10 been still pending. I think that, even so, the plaintiffs are met with the same difficulty, that the notice of May 10 was to acquire the front strips both east and west of Belford Grove. I will assume in favour of the plaintiffs that the council were acting within their powers—though I very much doubt whether it was so—in treating the notice as amended so as to include the back land of the shops or houses on the east of Belford Grove, and that one may read the notice of May 10, 1906, as amended in that respect in accordance with the letters of August and November; but, even so doing, one comes back to the attitude which the plaintiffs were adopting on November 21, 1906. They were then insisting that the notice was bad unless it was to be followed by something else, the acquisition of the leasehold interests; and to this the council declined to accede. The landowner, in other words, was only willing to accept the offer to buy the land comprised in the notice as extended by the subsequent correspondence, subject to certain conditions, and those conditions the purchasers or intending purchasers would not accept. The offer had been

EVE J.
1909
WILD
v.
WOOLWICH
BOROUGH
COUNCIL.

made without those conditions, the purchasers throughout had repudiated any intention of complying with those conditions, and it was not competent for the vendors to force upon the purchasers a new contract embodying those conditions. There was a complete repudiation, it seems to me, of the notice of May 10, 1906, even treating it as amended in the way I have indicated, on November 21, 1906; and from that time forward it would be impossible, I think, for any Court to hold that there was any contract arising out of the relationship created on May 10, 1906, which the vendors, the plaintiffs in this action, could enforce. I think, throughout, they have repudiated the contract; they have throughout attacked the validity of the notices, and it is not competent for them to say that, so repudiating them and so attacking them, they can now insist upon their performance, modified in a way which suits them, but in a way which the other contracting party never contemplated and never intended. Therefore on the main part of this action, which asks for various declarations, the action altogether fails.

Then it is said that at least the plaintiffs are entitled to some damages. That they did in fact stop negotiations which might, and so far as I can see probably would, have resulted in the conclusion of a beneficial lease, and that they did in fact abstain from putting the property comprised in these notices into repair, and making it more valuable for the purposes of letting, is uncontested. They felt that if these notices were to be followed up by an actual sale they might be in this difficulty: that it might be said that they had, after the receipt of the notices, created interests which imposed a burden upon the authority such as had not been anticipated at the date of the notices to treat, and for which, therefore, the authority could not be made liable. But they did that with their eyes open. They knew at the moment when they were abstaining from making their property more profitable that they were repudiating the right of the council to acquire their property on the only terms upon which the council were prepared to acquire it, and they deliberately elected to pursue a course of conduct consistent with an intention to act upon the notices, but somewhat inconsistent with the attitude which they were adopting

in repudiating the right of the authority to acquire under the notices. Having elected to adopt that course of conduct, I do not think it is to be wondered at that they would like now to get compensation from somebody for the misfortune which their conduct has landed them in; but what I have to see is whether there is any obligation arising out of the contract, or quasi-contract, or otherwise, which would enable me to visit upon the public authority the loss which the trustees have sustained. I cannot see any such obligation and I do not think there are any grounds upon which I can award the plaintiffs anything in the nature of damages.

It only remains, therefore, for me to dismiss the action, and to dismiss it with costs.

Solicitors: *Wadeson & Malleson; A. B. Bryceson.*

G. M.

In re ILLINGWORTH. BEVIR *v.* ARMSTRONG.

[1909 I. 364.]

Power—Appointment—"During coverture by will or deed"—Execution of Will during Coverture—Death of Testatrix discovert—Exercise of Power—Validity.

By a marriage settlement, made in 1878, the trustees were to hold the trust funds upon trust, after the death of the wife, for such persons as she should "during coverture by will or deed appoint," and in default of appointment, then in trust for her statutory next of kin. By her will, made in 1884, in the lifetime of her husband, she appointed the settled funds to her five brothers and sisters in equal shares as tenants in common. The husband died in 1886. In 1898 the widow made a codicil to her will, appointing the plaintiffs to be executors of her will and in other respects confirming her will. She died in 1908, discovert:—

Held, that the execution by the lady of her will, while under coverture, operated as a good exercise of the power of testamentary appointment contained in the settlement, notwithstanding that she died discovert.

Burnham v. *Bennett*, (1845) 2 Coll. 254, and *Cave* v. *Cave*, (1856) 8 D. M. & G. 131, considered and applied.

ADJOURNED SUMMONS.

By an indenture of settlement dated July 24, 1878, made on

EVE J.
1909
ILLINGWORTH, *In re.*
BEVIR *v.* ARMSTRONG.

the intended marriage of William Illingworth with Sarah Ann Holderness, after reciting that certain railway stocks therein mentioned, belonging to Sarah Ann Holderness, had been transferred into the names of Thomas Abbey Smithson and John Keogh Mainwaring (the trustees of the settlement), to be held upon trusts in the indenture mentioned, it was witnessed that, in consideration of the said intended marriage, it was agreed that T. A. Smithson and J. K. Mainwaring should, after the contemplated marriage, pay the income of the stocks and funds so transferred, or of the investments for the time being representing the same, to Sarah Ann Holderness during her life, for her sole and separate use, without power of anticipation, and after her death should stand possessed of the stocks and funds and the income thereof in trust for such person or persons and for such purposes as Sarah Ann Holderness should "during coverture by will or deed appoint," and in default of such appointment, and so far as no such appointment should extend, in trust for her statutory next of kin.

The defendant William Armstrong and the plaintiff the Rev. George Sarmon Bevir were the present trustees of the settlement.

The marriage of S. A. Holderness with William Illingworth took place on July 25, 1878.

On September 26, 1884, Sarah Ann Illingworth made her will, and after bequeathing a legacy to her stepson, William Knibb Illingworth, she gave, devised, bequeathed, and appointed all the remainder of her property, including the property subject to the trusts of her marriage settlement, to her five brothers and sisters, William Holderness, Ann Carter, John Holderness, James Holderness, and Hester Christiana Carter, in equal shares as tenants in common, and not as joint tenants; and she appointed her brothers John Holderness and James Holderness and her stepson, W. K. Illingworth, to be the executors of her will.

William Illingworth died on April 8, 1886.

By a codicil to her will, dated April 20, 1898, Sarah Ann Illingworth, after reciting that two of the executors of her will, namely, James Holderness and W. K. Illingworth, had died, revoked the appointment of the remaining executor, John Holderness, and appointed the plaintiffs, the Rev. George Sarmon Bevir

and the Rev. Hedley James Holderness, to be the executors of her said will, and she gave to each of them a legacy of twenty guineas for his trouble in acting as executor, and in all other respects she confirmed her said will.

Sarah Ann Illingworth died on December 27, 1908, and her will and codicil were proved by the plaintiffs on February 23, 1909. Only two of the brothers and sisters mentioned in the will, namely, the defendant John Holderness and Hester Christiana Carter, were living at the date of the death of Sarah Ann Illingworth.

The defendant Sarah Carter was one of the next of kin of the testatrix, being a child of Ann Carter, sister of Sarah Ann Illingworth, and she represented the children of the deceased brothers and sisters of the testatrix. A question having arisen as to whether the power of appointment had been properly exercised by the will of Sarah Ann Illingworth, the plaintiffs, as executors of the will, took out an originating summons on February 25, 1909, asking, inter alia, (1.) whether, according to the proper construction of the said settlement, the power of testamentary appointment during coverture conferred thereby on the said testatrix was validly exercised by her said will (as regards such of the appointees as survived her) by reason of the said will having been executed by her while covert, and notwithstanding that, at the date of the said codicil and also at the date of her death, the said testatrix was discovert.

Vaisey, for the executors of the testatrix.

P. O. Lawrence, K.C., and *T. K. Nuttall*, for the appointees. The power has been well exercised. The words "during the coverture by will appoint" must be read to mean "as she shall by will, signed by her during coverture, appoint." That is the only reasonable meaning that can be put upon the words. The case of *Cave* v. *Cave* (1) is of some assistance, but is rather the converse case to the present. A codicil has the effect of reiterating the words of a will, and may be a proper execution of a power: *In re Blackburn*. (2) In the case of *Burnham* v. *Bennett* (3) the words of the power to appoint were "during and

(1) 8 D. M. & G. 131. (2) (1889) 43 Ch. D. 75.
(3) 2 Coll. 254.

EVE J.
1909
ILLINGWORTH, *In re.*
BEVIR *v.* ARMSTRONG.

notwithstanding coverture," and the inquiry directed in that case whether a certain testamentary document had been executed during the coverture would have been wholly unnecessary if the answer that the lady died discovert—as in fact she did—would have been a good one. In *Holliday* v. *Overton* (1) the appointment had to be made by a will signed and published by a lady during the intended coverture, and a will executed by her with the prescribed formalities but after coverture was held invalid. There is another class of case referred to in Farwell on Powers, 2nd ed. p. 160, of which *Cooper* v. *Martin* (2), *Potts* v. *Britton* (3), and *In re Twiss's Trust* (4) are examples which may be relied upon by the other side, but they are distinguishable from the present. So also is the later case of *In re Moses.* (5) The appointment in the present case is therefore good.

Stewart-Smith, K.C., and *Sheldon*, for the next of kin, entitled in default of appointment. It is a question of the true construction of the words in the settlement. The will is not really a will until the death of the testatrix, and she died discovert. It would be dangerous to put the construction contended for upon the words in this settlement. It is really asked that "will" shall be read "instrument in writing." According to the decision in *Cooper* v. *Martin* (2) an appointment by will must be considered as made when the will comes into operation by the death of the appointor. The cases of *In re Twiss's Trust* (4), *Potts* v. *Britton* (3), and *In re Moses* (5) are all authorities which support this contention. Where a power has to be exercised by will within a limited period the words must be construed literally, and the appointment must be validly and effectively made within the limited period: *Price* v. *Parker.* (6)

T. E. Mansfield, for the trustees of the settlement.

P. O. Lawrence, K.C., in reply.

EVE J. The solution of the question raised by this summons is not as easy as it might at first sight appear. The facts are these. [His Lordship stated the terms of the settlement and the

(1) (1852) 14 Beav. 467.
(2) (1867) L. R. 3 Ch. 47, 56.
(3) (1871) L. R. 11 Eq. 433.
(4) (1867) 15 W. R. 540.
(5) [1902] 1 Ch. 100.
(6) (1848) 16 Sim. 198.

appointment by the will, and continued:—] The form of the settlement, which is unusual, may possibly be due to some error or slip in the engrossment, but I have to construe it. The lady having made her will in the lifetime of her husband, he died on April 8, 1886, and twelve years afterwards, on April 20, 1898, his widow made a codicil in these terms: [His Lordship read the codicil, and continued:—]

She died, without having married again, on December 27, 1908, and her will and codicil were proved on February 23, 1909. In that state of affairs the question raised by the summons is whether, according to the true construction of the settlement, the power of testamentary appointment thereby conferred upon the wife was validly exercised by the will, executed by her while covert, seeing that she subsequently became, and down to her death remained, discovert. Having looked at all the cases to which my attention has been directed during the argument, and having had an opportunity of considering them while the hearing has been standing over, I am of opinion that there is no reported case which has decided this exact question one way or the other. At first I was much pressed with the decision in *Cooper* v. *Martin*. (1) That certainly, at first sight, seemed to me to be a case establishing this principle, that an appointment by will must be regarded as made when the will comes into operation, on the death of the appointor, and not before. But on further examination I doubt whether the decision establishes that as a general principle of universal application. I think *Cooper* v. *Martin* (1) recognizes that it is a question of the construction of the instrument creating the power, and determines that, if, as a matter of construction, it is of the essence of the execution of the power that it should be executed and take effect within a limited time, it cannot be executed by any instrument which does not in fact become effective for all purposes within the limited time, and accordingly that a testamentary execution during the limited time by a donee who survives the limited time is inchoate, invalid, and ineffectual. In *Potts* v. *Britton* (2) the settlement was so construed as to make the principle of *Cooper* v. *Martin* (1) applicable

(1) L. R. 3 Ch. 47. (2) L. R. 11 Eq. 433.

EVE J.
1909
ILLINGWORTH, *In re.* BEVIR *v.* ARMSTRONG.

to a testamentary appointment made by an appointor who subsequently, in his lifetime, forfeited all interest in the property, including all powers of appointment. I do not regard either of these cases as concluding the point which I have to determine here. In such determination I think I am most assisted by a case cited and relied upon by the appointees—the case of *Burnham* v. *Bennett*. (1)

In *Burnham* v. *Bennett* (1) two powers of appointment were conferred upon the wife by the settlement. It was in fact a post-nuptial settlement, but nothing turned upon that. The first power was a limited power to appoint amongst children of the marriage and "notwithstanding coverture"; the words were as the wife "at any time, or times, notwithstanding her coverture, by any deed or writing with or without power of revocation, or by her last will and testament, in writing, or by any writing purporting to be or in the nature of a will to be by her duly signed, sealed, and delivered, in the presence of, and to be attested by two or more credible witnesses, should give, direct, limit or appoint the same," and in default of such appointment upon trust as therein mentioned; but in case there should be no such child or children, then upon trust to pay, assign, and transfer the said stock, moneys, and premises unto or amongst such person or persons, &c., as the wife "at any time or times during and notwithstanding her coverture, by any deed or deeds, writing or writings, with or without power of revocation, or by her last will and testament in writing, or any writing purporting to be or in the nature of a will to be by her duly executed in manner aforesaid, should give, direct, limit, or appoint the same"; and in default of such appointment, upon trust to pay and transfer the trust funds unto the husband, his executors, administrators, and assigns. The first point which the Vice-Chancellor had to determine was whether the expression "during and notwithstanding her coverture" meant the same as the expression "notwithstanding her coverture," or whether the addition of the words "during and" in any way limited the power of appointment. The Vice-Chancellor came to the conclusion, having regard more particularly to the change of expression,

(1) 2 Coll. 254; 9 Jur. 888; (1847) 1 De G. & Sm. 513.

that it was quite impossible for him to disregard the words "during and," and that he must treat the power of appointment in default of children as a power exercisable only during coverture. Upon this it became necessary to examine into the facts, which were as follows. The marriage had taken place in 1813; the husband had died in 1819, and his widow in 1840. At the time of her death she had executed two documents, both of a testamentary character, the one, as was alleged, in 1816 during coverture, and the other in 1840. It was alleged that the former of these documents was not executed in 1816, although it bore date August 20, 1816, or at all during the coverture, and, further, that it was not executed or attested in accordance with the requirements of the power.

By the decree (see 9 Jurist, 890) it was referred to the Master "to inquire whether the instrument of 1816 was executed during the coverture; at what time the signature of Susanna Stephens was affixed to the foot of that instrument; by whom, and at what time or times, and for what purposes the names Morris Ward and John Ward were written at the foot of that instrument; in what manner and form, if at all, and with what, if any, ceremony or ceremonies, the said Susanna Stephens executed that instrument."

In 1847 the Master made his certificate, the only result of which was that he stated such facts as he had been able to ascertain, and left it to the Court to determine, on those findings, whether the persons who claimed under the instrument of 1816 had established their claim. On the further consideration the Vice-Chancellor said that the burden of proof was upon those who maintained the validity of the appointment, and that in his opinion the evidence was insufficient. That is not an actual decision upon the point before me, but it is quite clear that the whole of the inquiry and the whole of the proceedings subsequent to the decree in 1845 were unnecessary if the short answer to the claim of those maintaining the appointment of 1816 was that the subsequent death of the appointor, discovert, rendered any attempted execution of the power by testamentary document abortive. I cannot believe that the various counsel engaged in that case, which lasted for a long time, or Vice-Chancellor Knight

EVE J.
1909
ILLINGWORTH, *In re.*
BEVIR *v.* ARMSTRONG

Bruce himself, would have overlooked that short answer if either they or he had entertained any doubt as to the execution being good, if in fact the document had been executed in 1816, while the lady was covert.

Further assistance is afforded by the case of *Cave* v. *Cave* (1), where there was a power to the survivor of the spouses to appoint by will, and the husband during his wife's lifetime, in 1847, executed a will referring to the power and appointing the fund to some of the children of the marriage. His wife then died, and the contingency arose which vested in him the power of appointment.

He married again, and his will was thereby revoked as to his own property given by it, but on his death—without any further attempt to exercise the power—a question was raised whether the will could be held to be an execution of the power as speaking at his death.

It was argued that the will must speak as at the death of the testator, and therefore as if executed after the death of his wife, but Knight Bruce L.J. declined to adopt that view, and treated the position of affairs at the date when the will was executed as being the material date for ascertaining whether the power of appointment had in fact been exercised.

I think, with these two cases to support the view I take in the present case, I am justified in holding that the execution by this lady of her will while under coverture operates as a good exercise of the power, notwithstanding that she died discovert, and therefore the surviving appointees under the will are entitled to claim the benefit of the appointment. I therefore answer the first question asked by the summons in the affirmative. The costs will come out of the settlement funds.

Solicitors: *Ernest Bevir; Ullithorne, Currey & Co., for Toulmin, Ward & Co., Liverpool*; *Sims & Syms.*

(1) 8 D. M. & G. 131.

G. M.

REID *v.* BICKERSTAFF.

[1908 R. 516.]

C. A.
1908
JOYCE J.
Dec. 3, 4, 7, 8, 9, 10, 15, 16.
1909
March 1.
C. A.
May 13, 18, 19, 27.

Vendor and Purchaser—Restrictive Covenants—Building Scheme—Rights of Purchasers inter se—Benefit annexed to Land—Assigns.

In order to establish the existence of a building scheme there must be definite reciprocal rights and obligations extending over a defined area.

If on a sale of part of an estate the purchaser covenants with the vendor, his heirs and assigns, not to deal with the purchased property in a particular way, a subsequent purchaser from the same vendor of another part of the estate does not take the benefit of the covenant unless he is an express assignee thereof, or unless the covenant is expressed to be for the benefit and protection of the particular parcel purchased by the subsequent purchaser. The benefit of a covenant capable of being annexed to land, but not expressed to be so annexed, either by the deed containing the covenant or by some subsequent instrument executed by the covenantee, does not pass as an incident of land on a subsequent conveyance.

By a deed dated in 1840 the defendant's predecessor in title bought a piece of land, part of an estate comprising about sixty-four acres on the outskirts of Liverpool, which was vested in trustees for sale, and, for himself, his heirs and assigns, covenanted with the vendors, their heirs and assigns, to observe certain restrictions relating to building on the land purchased. The trustees subsequently sold other portions of the estate to the predecessors in title of the plaintiffs, who entered into similar restrictive covenants affecting the land purchased by them. There was nothing to shew whether the plaintiffs' predecessors were aware of the existence of the covenants of 1840, and there was no reference to them in their conveyances. The trustees at intervals before and after 1840 sold other plots of the estate to various purchasers who entered into varying covenants of a like nature, and eventually the whole estate was disposed of and became a residential quarter.

In an action by the plaintiffs to restrain the defendant from building in breach of the covenants contained in the deed of 1840 :—

Held by Joyce J., on the evidence, that there was sufficient to enable the Court to infer the existence of a general building scheme affecting the estate of the common vendors, and that the plaintiffs were entitled to an injunction.

Held by the Court of Appeal—(1.) that the plaintiffs had failed to establish the essential requisites of a building scheme, namely, definite reciprocal rights and obligations extending over a defined area; and (2.) that inasmuch as the benefit of the covenants in the deed of 1840 was not expressly assigned to the plaintiffs' predecessors, nor so annexed

C. A. 1909 REID v. BICKERSTAFF.

to the land of which they were the assigns as to pass by mere conveyance, the plaintiffs were not entitled to succeed.

Decision of Joyce J. reversed.

APPEAL from a decision of Joyce J.

The action was brought to enforce restrictive covenants entered into by one Rollo, the predecessor in title of the defendant, upon the purchase by Rollo of a piece of land forming part of a copyhold estate which was devised by the will of Edward Falkner to trustees for sale.

The covenant in question was contained in a deed dated November 20, 1840. That deed was a covenant by the trustees of Falkner's will to surrender to Rollo the piece of land above mentioned. Thereby Rollo covenanted for himself, his heirs and assigns, with the trustees, their heirs and assigns, that Rollo, his heirs and assigns, would not at any time thereafter apply or use the piece of land so as aforesaid covenanted to be surrendered to his use to any purposes other than the erection of dwelling-houses thereon, and that not more than three dwelling-houses with necessary offices and outbuildings attached thereto should be erected or permitted to be erected on the said piece of land, and that no buildings whatever (save and except fences, walls, or palisades) should at any time thereafter be erected on the said piece of land nearer the front of Beech Street than twelve yards, and that each dwelling-house with the offices attached thereto should not cover or occupy less than 100 square yards of land, and should not exceed more than two storeys in height, and should be built of or fronted with white stone or be cemented in imitation of white stone on all four sides thereof.

Upon the piece of land in question a dwelling-house now known as "The Lindens" was afterwards erected in compliance with the terms of the covenant.

The Falkner trustees subsequently, in the years 1843, 1846, and 1847, conveyed other portions of the estate to the plaintiffs' predecessors in title, who respectively entered into covenants with the trustees in terms similar to those contained in the deed of 1840, but there was no mention in these subsequent conveyances of the covenants contained in the deed of 1840, nor were the purchasers aware of the existence of such covenants.

By an agreement dated January 2, 1908, and made between G. J. Bedford, in whom the premises comprised in the indenture of 1840 were then vested, of the one part, and the defendant of the other part, Bedford agreed to sell the said premises to the defendant, who agreed to purchase the same, and the sale was declared to be subject to the restrictive covenant contained in the indenture of 1840, and a copy of the covenant was annexed to the contract.

The Falkner trustees eventually sold the whole of the remainder of the estate in lots to various purchasers subject to similar restrictive covenants, and, with few exceptions, dwelling-houses were erected upon all the lots, the whole estate being of a residential character.

In March, 1908, the defendant commenced to build large business premises on his land for the purpose of carrying on thereon the business of a coach and car proprietor. The intended buildings included stables for forty horses and large sheds for vehicles of all kinds.

The plaintiffs then brought this action, claiming (1.) a declaration that they were entitled to enforce against the defendant the restrictive covenants contained in the deed of 1840, and (2.) an injunction to restrain him from erecting his proposed buildings in contravention of the said covenants.

The plaintiffs contended (1.) that there was a building scheme affecting the estate of the common vendors, and each purchaser was under an implied covenant or obligation to every other purchaser to conform to and obey the provisions of the scheme, including the restrictive covenant in question; and (2.) that apart from any building scheme the plaintiffs were entitled to the benefit of the restrictive covenants which were entered into with the common vendors, their heirs and assigns, they being assigns of the land for whose benefit the covenants were entered into.

The action was tried by Joyce J., in whose judgment the facts will be found more fully stated. The action came on for hearing on December 3, 1908.

Hughes, K.C., *Buckmaster, K.C.*, and *Somers Browne*, for the plaintiffs.

C. A. 1909 REID v. BICKERSTAFF.

P. O. Lawrence, K.C., Younger, K.C., J. Rutherford, and *B. B. Benas,* for the defendant.

1909. March 1. JOYCE J. This is an action to enforce restrictive covenants entered into by the predecessor in title of the defendant upon the purchase by such predecessor, in April, 1840, of a piece of land, in extent about an acre, fronting Beech Street, in the manor of West Derby, and now, I think, a part of the city of Liverpool. This land formed part of what was for convenience referred to in the argument as the Fairfield estate, of copyhold tenure, devised by the will of Edward Falkner, who died in 1825, having bequeathed to and vested in his trustees all his property, both real and personal, with full power to sell any part of his landed property either in West Derby or Liverpool. The covenant in question is contained in a deed dated November 20, 1840, being a covenant by the trustees of Falkner's will to surrender to Rollo the piece of land I have mentioned, and thereby Rollo, the purchaser, covenanted for himself, his heirs and assigns, with the trustees, their heirs and assigns, in the following terms: [His Lordship read the covenant, and continued.] Now, as has been said before in similar cases, whatever be the ultimate result of this action, no reasonable person can have much sympathy for the defendant. He agreed to purchase expressly subject to the restrictive covenant contained in the deed of 1840, a copy of which covenant was embodied in his contract.

The action was instituted on March 7, 1908. Whether or not the defendant has since completed his purchase I do not know, nor is it material. What the defendant has bought is described in the agreement for purchase dated January 2, 1908, as "that piece of land with the messuage or dwelling-house cottage house, stable, conservatory, greenhouse and hothouse and other buildings thereon (formerly known as 'Beech Mount' but now as 'The Lindens') situate on the westwardly side of Beech Street in West Derby," and then we have the dimensions, "subject to the yearly rent to the lord of the manor," and so on, "and to certain restrictive covenants contained in an indenture dated the 20th November, 1840, made between Edward Dean Falkner and

John Banastre Falkner of the one part and Robert Rollo of the other part so far as the same are now subsisting and capable of taking effect, a copy whereof is hereunto annexed."

What the defendant threatens and claims to do, or what he has done, is that he has caused foundations to be laid for, and commenced to build, large business premises for the purpose of carrying on the business of a coach and car proprietor, such buildings including stables, intended to accommodate more than forty horses, and large covered stands for cars, waggonettes, charabancs, and coaches, and sheds and other buildings. What he proposes appears to me to be a plain and palpable breach of the restrictive covenant, if it be still binding or enforceable, into which his predecessor Rollo entered. Indeed, I do not understand the contrary to have been seriously if at all contended.

Various defences have been raised, amongst others that the character of the neighbourhood has changed, and acquiescence by the plaintiffs or their predecessors in title. What I have called the Fairfield estate was bounded on the north by an old turnpike road, of which the part in question is now known as Prescot Road. In recent times no doubt the character of this particular road on the outside of the estate has changed, and it is now one of the main thoroughfares out of Liverpool, upon which tram lines have been laid down, and the vehicular and other traffic has greatly increased. In this road many buildings, originally erected as dwelling-houses, have been converted into or are now occupied as shops and for purposes of trade. Unfortunately a covenant not to erect anything but private houses does not preclude the subsequent conversion of such dwelling-houses into shops: see the case before Stirling J. of *Holford* v. *Acton Urban Council.* (1) It may perhaps be doubted whether what has taken place on the south side of Prescot Road has been really injurious to the rest of the estate situate further to the south. Indeed I should think it has not been injurious to any portion so far off as that in which the respective properties of the plaintiffs and the defendant are situate. There are advantages as well as disadvantages in the propinquity of shops and means of locomotion outside a residential quarter. Moreover it was, I

(1) [1898] 2 Ch. 240,

C. A. 1909 REID v. BICKERSTAFF. Joyce J.

should think, practically impossible for a private person or any number of private persons to prevent what has happened in this road, and at all events I do not think that the plaintiffs or their predecessors could have succeeded in doing it. There are also a number of stables on various parts of the estate, but these were, I think, originally erected as appurtenant to some dwelling-house, and so are probably not obnoxious to a covenant not to erect any building but private dwelling-houses. Upon the whole I consider it not to have been made out before me that there has been any alteration in the character of the neighbourhood caused by the conduct of the plaintiffs or their predecessors in title, or by any fault or omission on their part. Any such ground of defence, therefore, in my opinion has not been substantiated.

But the real question in the action, and a serious question it is, remains, namely, whether the plaintiffs or any of them are entitled to enforce the covenants into which the predecessor in title of the defendant entered when he bought, and expressly subject to which the present defendant agreed to purchase. "The Lindens" is situate in a district, whatever its precise limits may be, which was, and, notwithstanding the somewhat peculiar views expressed by the only witness called for the defendant, is still, of the character commonly termed residential, and in all probability will so remain for some time to come, unless this action fails. This I take to be the result of the evidence before me, and indeed it is fairly obvious from the consideration of a plan of the neighbourhood, although some plots forming part of the land devised to the Falkner trustees have not been yet actually built upon. The trustees, however, have disposed of all they had. The plaintiffs respectively derive their title from persons who purchased from the same vendors as Rollo, their purchases being subsequent in date to his. The plaintiff Morrice derives title from one of these subsequent purchasers named Ross to premises purchased by Ross in February or March, 1843; the plaintiff Jones from the same Ross to premises purchased in September or October, 1843; and the plaintiffs Reid and Morrow from another subsequent purchaser named Scott, who bought in June, 1846. Upon the subsequent sales in 1843 to Ross and in 1846 to Scott there was no express assignment of the benefit of

the covenant entered into by Rollo in 1840. The premises I have already mentioned as being held respectively by the plaintiff Morrice and the plaintiff Jones deriving title from Ross were adjacent to, and one actually adjoined, the defendant's premises, now called "The Lindens." Ross upon his first purchase in 1843, for himself, his heirs, executors, and administrators, covenanted with the Falkner trustees, their heirs and assigns, that no buildings other than two dwelling-houses with outbuildings and appurtenances should be erected on the land, which dwelling-houses should be two storeys high and no more, and should each cover a space of not less than eighty square yards, and that the walls of all such dwelling-houses should be fronted with white stone or cement in imitation of stone, and that no buildings whatsoever other than fences, walls, and palisadings should be erected on the land nearer to the street than twelve yards, and that there should be no common passages or back entrances to the said houses, and that each such house should have its own separate entrance. Upon his later purchase in the same year Ross entered into similar covenants. Similarly Scott, upon his purchase in 1846, not actually completed, I think, until some little time afterwards, entered into covenants of a like nature.

Now, whenever a quantity of building land is sold in plots, either all at one auction or gradually, as opportunity offers and purchasers can be found, and each of the several purchasers is required to enter into the same perpetual covenants restrictive of the position and character of the buildings at any time to be erected on the ground purchased by him and the like, then, even although there may not have been inserted (according to the practice in recent years, and now usually adopted) in each of the material documents an express declaration that the covenants are intended to enure and be for the benefit of all, whether prior or subsequent purchasers or their successors in title, and enforceable by them, still, as I understand the result of the authorities at the present time, of which the case of *Nottingham Patent Brick and Tile Co.* v. *Butler* (1) is perhaps the one most often referred to—see also *Collins* v. *Castle* (2), *Spicer* v. *Martin* (3), and *Rogers*

(1) (1885) 15 Q. B. D. 261; (1886) 16 Q. B. D. 778.

(2) (1887) 36 Ch. D. 243.

(3) (1888) 14 App. Cas. 12.

C. A. 1909 REID v. BICKERSTAFF. Joyce J.

v. *Hosegood* (1)—in order that the covenants may confer mutual rights and impose a similar burden upon all, it is not necessary to find any express contract by the vendor or the several purchasers to that effect. It may be collected or inferred from the nature of the transaction. The question whether the several purchasers of parts of a building estate are entitled to enforce against one another the restrictive covenants that they have respectively entered into depends upon the intention which is to be gathered from all the circumstances in each case—that is to say, whether the restrictions were imposed merely with the object and intention of in some way protecting the vendor himself, as in *Keates* v. *Lyon* (2), or for the mutual benefit and advantage of the purchasers, as in the case of *Nottingham Patent Brick and Tile Co.* v. *Butler* (3) and similar cases.

For instance, if we found that 100 years ago the whole of a quantity of building ground had been sold in plots out and out, with the same or similar restrictive covenants on the part of the purchasers in each case, so expressed as to bind their successors and to be always in force, an arrangement which obviously, I think, could not have been systematically adopted in pursuance of any design other than the mutual advantage and protection of the several owners for the time being, then I think that in such circumstances the Court ought to infer that it was the intention of all concerned that each purchaser should continue to be entitled to the benefit of and able to enforce against other purchasers with notice the covenants entered into by them or their predecessors. As Lord Macnaghten said in *Spicer* v. *Martin* (4), the community of interest imports a reciprocity of obligation which each of the covenantors must have contemplated and expected. *Hudson* v. *Cripps* (5), approved by the Court of Appeal in *Jaeger* v. *Mansions Consolidated, Ld.* (6) and *Gedge* v. *Bartlett* (7), a case between the tenants, or some of the tenants, and the owner of flats in the same mansions, is, I think, an illustration of the same principle.

(1) [1900] 2 Ch. 388.
(2) (1869) L. R. 4 Ch. 218.
(3) 15 Q. B. D. 261; 16 Q. B. D. 778.
(4) 14 App. Cas. 12.
(5) [1896] 1 Ch. 265.
(6) (1903) 87 L. T. 690.
(7) (1900) 17 Times L. R. 43.

In *Renals* v. *Cowlishaw* (1) the facts were these. The owners of an estate which comprised a mansion and grounds, and also certain pieces of land adjoining, in 1845 sold some portions of the adjoining lands, the purchasers in each case covenanting with the vendors, the owners of the mansion and grounds, not to build upon the lands conveyed to them within a certain distance from a particular road, that the garden walls or palisades to be set up along the side of the said road should stand back a certain distance from the centre of the road, that any house to be built on the land adjoining the road should be of a certain value, and of an elevation at least equal to that of the houses on a particular road, and that no trade or business should be carried on in any of such houses or buildings, but that the same should be used as private dwelling-houses only. There was no contemporaneous sale, nor, so far as it appears, although I admit the vendors were trustees for sale, was a sale then even contemplated of the mansion and grounds. Nine years afterwards the vendors did sell the mansion and grounds to Bainbrigge, but without his entering into any covenant similar to that which the purchasers of the pieces of adjoining land previously sold had entered into, and indeed without any restrictive covenant at all. Then, sixteen years later still, Bainbrigge's representative sold to the plaintiffs, who brought the action against the owners of one of the pieces of land sold in 1845 to enforce the covenants entered into by his predecessor. Both the Vice-Chancellor and the Court of Appeal considered it impossible to determine whether the covenant sued upon was originally intended and imposed for the benefit of the owner of the mansion, or for whose benefit, other than the vendors personally as such, the covenant was intended to enure, and the action was dismissed.

In the present case there is not, in my opinion, any such question as arose in *Renals* v. *Cowlishaw* (1), that is to say, whether the restrictive covenant entered into was required and intended for the benefit of the vendors as the owners of some other property not offered for sale and never subjected to any restrictive covenant at all, or for the mutual benefit of the

(1) (1878) 9 Ch. D. 125.

C. A. 1909 — REID v. BICKERSTAFF. — Joyce J.

owners inter se of the adjoining land sold in 1845. The vendors here were not ordinary owners: they were merely trustees acting under a power of sale; nor was it the case of an owner of a town estate granting long leases, as in *Master* v. *Hansard* (1), and imposing conditions with a view to securing the value to himself or his successors of the reversion unimpaired when the leases should fall in. In the case of the Fairfield estate, the trustees having at various dates disposed of outlying portions of the land, for instance certain portions sold for a brewery, and a portion sold for a Jewish cemetery fronting upon external streets or away from the rest of the estate, appear subsequently to have seriously set about the realization of all that was left. For in August, 1835, a considerable portion of the estate in eight large lots abutting upon the new streets formed by the vendors was put up for sale by auction. One of such lots, namely, lot 4, it was ultimately agreed before me, included the site of "The Lindens" or of a great part of those premises, and it included also the premises to which the plaintiffs Reid and Morrow derive their title from Scott. Another, lot 3, included the premises owned by the plaintiff Morrice, as well as those owned by the plaintiff Jones, each deriving title from Ross. The advertisement of this auction has been referred to in the file of the *Liverpool Mercury*. It concludes with the statement that application may be made to so and so, where plans and particulars may be had. Unfortunately, and somewhat to my surprise, not a single extant copy of the plan and particulars can now be discovered. The land was described as in or fronting a named street, and was no doubt—at least I do not doubt—offered as land for building upon, although not expressly so stated in the newspaper advertisement. It does not appear that any sale was effected at the auction, but from that time at all events, if not from an earlier date, what remained, being the central portion of what the vendors originally had, was, I do not doubt, looked upon and considered as building land, or rather as forming a building estate, and was being gradually got rid of, as opportunity offered, according to a scheme of the vendors for the disposal of the whole in plots of suitable size for the erection of

(1) (1876) 4 Ch. D. 718.

one or two private residences by the purchaser of each plot. At the time of and prior to the sale to Rollo in 1840 there was not, I think, any question of part of the land being retained or reserved. All was, I have no doubt, for sale. Now, in order to dispose of an estate in plots for building purposes to the best advantage, and at the price which land eligible for building of private residences will fetch, it is necessary to divide it into lots of suitable size, laid out according to some plan, and it is practically, I think, a matter of necessity to lay down a scheme for the regulation of all building to be done upon the estate, and possibly other matters, and upon the sale of each lot to impose restrictions accordingly upon the purchaser and his successors. This is a general if not the universal practice. It is no doubt in the interest of the vendors to adopt such a course, for thereby no doubt they get a better price than otherwise would be obtained, but the restrictions imposed and the covenants to be observed are not otherwise or directly for their benefit. These restrictions and covenants would not answer the purpose for which they were intended, and indeed would be useless, unless the obligation imposed were a permanent one and continued to be mutually enforceable by the owners for the time being. There was therefore, I think, a strong antecedent probability that the Falkner trustees, having laid out their land in plots, would arrange and impose a scheme of regulations to be observed with respect to the buildings to be erected upon the plots sold from time to time, and accordingly we find that as and when the trustees, down to April, 1847, sold various plots to different purchasers, they required them, and in particular Rollo and Scott, as I have already mentioned, to enter into restrictive covenants. It appears by the record of the surrenders on the court rolls that restrictive covenants were required in practically every instance. In the case of several of these sales the exact terms of the restrictive covenants entered into by the purchaser have been ascertained and are in evidence. I said that restrictive covenants were imposed in practically every case. The only exceptions, so far as I understand, appear to be in the case of two or three narrow strips originally, no doubt, set out or retained as ways or passages so situate or circumstanced as not to be eligible for building upon at all.

C. A. 1909 — REID v. BICKERSTAFF. — Joyce J.

In the year 1847 the trustees sold all the residue that was left to one Lilley, who then covenanted that no buildings except private dwelling-houses should at any time be erected on any part thereof, nor any dwelling-house of less than a certain value. It is true that the actual covenant entered into by Lilley was not so extensive as those previously imposed. Perhaps the trustees and the vendors, having regard to *In re Birmingham and District Land Co. and Allday* (1), ought to have required from Lilley a more stringent restrictive covenant than they did. But he proceeded to impose additional covenants more stringent than ever upon the purchasers of the plots he or his representatives from time to time have been since selling. As it seems to me, there was no sense or reason in imposing restrictive covenants upon Lilley and his assigns at all, except for the benefit of the previous purchasers from the trustees. Some of the plaintiffs are also owners of plots with residences erected upon them under sales made by Lilley where the more stringent restrictive covenants were imposed.

Now I cannot say that it is proved to absolute demonstration, by the express terms of documents produced and the testimony of living witnesses, that the sales to Rollo, predecessor in title to the defendant in 1840, nearly seventy years ago, and to Ross and Scott, predecessors of the plaintiffs in 1843, more than sixty-five years ago, were sales in pursuance of what in the books is (perhaps not very happily) referred to as a building scheme, but at the same time I have no doubt whatever that it was so. When I look at the maps shewing how the estate has in fact been laid out and built upon by the different purchasers, and considering what is proved as to restrictive covenants being systematically required and entered into, and how, speaking generally, they have been observed and understood to be the rule of the estate—in short, having regard to all the circumstances of the case, I feel no serious difficulty in inferring—there is enough to satisfy me—how I ought as a jury to answer the question of fact, whether it was or was not contemplated and expected, and the intention of all parties concerned, that in pursuance of a general scheme relating to the

(1) [1893] 1 Ch. 342.

estate each one of the several purchasers should be bound by and should, as against the others, have the benefit for ever of the covenants entered into. If not, the imposition of these covenants would have been futile. In pursuance of what other rational design or for what other purpose were the covenants required? None that I can see, or that has even been suggested to me. At all events I think that, when the several predecessors in title of the plaintiffs and of the defendant respectively purchased and took conveyances of their respective plots, the restrictive covenants entered into by each of the respective purchasers were imposed in pursuance of a scheme that had been laid down for the regulation of all building upon the part of the estate that comprised all those plots, and I think that it must have been intended and understood that these covenants should enure and be for the mutual benefit of all. There was community of obligation and also, in my opinion, reciprocity of right to enforce this obligation. The proposed breach by the defendant of the restrictive covenants entered into by his predecessor, and expressly subject to which the defendant purchased, would, in my opinion, occasion damage to the plaintiffs. Consequently I hold that they are entitled to such an injunction as claimed.

C. A. 1909 REID v. BICKERSTAFF. Joyce J.

From this decision the defendant appealed. The appeal came on for hearing on May 13, 1909.

C. A.

P. O. Lawrence, K.C., Younger, K.C., John Rutherford, and *B. B. Benas,* for the appellant. There is here an absence of all the conditions required to constitute a general building scheme. There is no reference in any conveyance to the conveyance of any other property; no commencement, no uniform plan, no reciprocity; and there is a great divergence in the covenants. A building scheme is a matter of contract. Every person entering into a building scheme must know with whom he is bargaining. There must be a definite plan defining the area of the land subject to the scheme, and this must be brought to the knowledge of the parties. Reciprocity of burden implies reciprocity of benefit, but here on one side of the estate there are large buildings, and on the other side workmen's cottages. The

C. A. 1909 REID v. BICKERSTAFF.

only part of the estate as to which it may be said there is any building scheme is Fairfield Terrace. This case is covered by *Renals* v. *Cowlishaw* (1), which was approved by the House of Lords in *Spicer* v. *Martin* (2), and by *Osborne* v. *Bradley*. (3) The law is correctly summed up by Parker J. in *Elliston* v. *Reacher* (4), but that case is distinguishable from the present in its facts. Then it will be said that, apart from any building scheme, the plaintiffs are entitled to succeed on the principle of *Rogers* v. *Hosegood* (5), but the distinction is that there is in this case no defined land for the benefit of which this covenant was intended to enure, and the plaintiffs' predecessors were not aware of the existence of the covenant. That brings this case within *Master* v. *Hansard*. (6)

Hughes, *K.C.*, *Buckmaster*, *K.C.*, and *Somers Browne*, for the respondents. If it is intended or can be inferred from the deeds that this particular land was meant to be laid out and used as a residential estate, then there is a mutual right to enforce the restrictive covenants. This is a fact to be inferred, and it appears here that from 1835 all the sales of the various plots that have been made were made upon the footing that this was to be a residential estate, and all the plots were sold subject to restrictive covenants. This is sufficient to prove that these covenants were imposed in pursuance of a building scheme: *Spicer* v. *Martin*. (2) The first point to be determined is whether the covenant or contract in its inception binds the land; if it does, it is then capable of passing with the land to subsequent assignees: *Rogers* v. *Hosegood* (7); *Renals* v. *Cowlishaw*. (1)

Younger, *K.C.*, in reply, referred to *Child* v. *Douglas* (8) and *Keates* v. *Lyon*. (9)

Cur. adv. vult.

May 27. COZENS-HARDY M.R. This is an appeal from a judgment of Joyce J., who has held that the plaintiffs are entitled to

(1) 9 Ch. D. 125; (1879) 11 Ch. D. 866.
(2) 14 App. Cas. 12.
(3) [1903] 2 Ch. 446.
(4) [1908] 2 Ch. 374, 665.
(5) [1900] 2 Ch. 388.
(6) 4 Ch. D. 718.
(7) [1900] 2 Ch. 405.
(8) (1854) Kay, 560; 5 D. M. & G. 739.
(9) L. R. 4 Ch. 218.

enforce against the defendant the restrictive covenants contained in a deed of November 20, 1840. The defendant claims through the purchaser of 1840. The plaintiffs are owners of land and houses purchased from the same vendors in 1843 and 1846, and the lands so purchased are adjacent to, or not far distant from, the defendant's land. The case of the plaintiffs rests upon two alternative propositions, either of which, if established, will entitle them to the relief they claim: (1.) There was a building scheme affecting the estate of the common vendors, and each purchaser became under an implied covenant or obligation to every other purchaser to conform to and obey the provisions of the scheme, which included the restrictive covenant in question. (2.) Apart from any building scheme, the plaintiffs, or some of them, are entitled to the benefit of the restrictive covenants which were entered into with the common vendors, their heirs and assigns, they being assigns of the land for whose benefit the covenants were entered into. Different considerations apply to these two propositions, and it will be convenient to deal with them separately. (1.) What are some of the essentials of a building scheme? In my opinion there must be a defined area within which the scheme is operative. Reciprocity is the foundation of the idea of a scheme. A purchaser of one parcel cannot be subject to an implied obligation to purchasers of an undefined and unknown area. He must know both the extent of his burden and the extent of his benefit. Not only must the area be defined, but the obligations to be imposed within that area must be defined. Those obligations need not be identical. For example, there may be houses of a certain value in one part and houses of a different value in another part. A building scheme is not created by the mere fact that the owner of an estate sells it in lots and takes varying covenants from various purchasers. There must be notice to the various purchasers of what I may venture to call the local law imposed by the vendors upon a definite area. *Keates* v. *Lyon* (1), *Martin* v. *Spicer* (2), *Osborne* v. *Bradley* (3), and *Elliston* v. *Reacher* (4) seem to me to bear out what I have said. (2.) If on a sale of

(1) L. R. 4 Ch. 218.
(2) 14 App. Cas. 12.
(3) [1903] 2 Ch. 446.
(4) [1908] 2 Ch. 374, 665.

C. A. 1909 — REID v. BICKERSTAFF. — Cozens-Hardy M.R.

part of an estate the purchaser covenants with the vendor, his heirs and assigns, not to deal with the purchased property in a particular way, a subsequent purchaser of part of the estate does not take the benefit of the covenant unless (*a*) he is an express assignee of the covenant, as distinct from assignee of the land, or (*b*) the restrictive covenant is expressed to be for the benefit and protection of the particular parcel purchased by the subsequent purchaser. In the case of (*a*) of course the subsequent purchaser can sue. In the case of (*b*) the benefit of the covenant passes to the purchaser, whether he knew of its existence or not. It is in the nature of an easement attached to his property as the dominant tenement. But unless either (*a*) or (*b*) can be established, it remains for the vendor to enforce or abstain from enforcing the restrictive covenant. For example, I sell a piece of land with a covenant that no public-house shall be erected thereon. I sell the adjoining lot to a purchaser who is ignorant of the existence of the covenant. I am at full liberty to release the covenant, or to assign the benefit of it to any particular purchaser, or to deal with the rest of my land as I think fit. It is irrelevant to urge that the performance of the covenant would be greatly for the benefit of the adjoining land. The benefit of a covenant capable of being annexed to land, but not expressed to be so annexed, either by the deed containing the covenant or by some subsequent instrument executed by the covenantee, does not pass as an incident of land on a subsequent conveyance. *Renals* v. *Cowlishaw* (1) and *Rogers* v. *Hosegood* (2) seem to me to bear out what I have said.

It remains to apply the principles deduced from the above authorities to the present case. I do not propose to state the facts in detail. Suffice it to say that the plaintiffs have wholly failed to define the area of the scheme. In the statement of claim they alleged three separate schemes of different parts of the estate of sixty-four acres. This has been abandoned, and they now contend for one scheme affecting the whole estate of sixty-four acres. There is no evidence of any such scheme, and there is ample evidence against any such scheme. No plan, either before 1840, which is the critical date, or since 1840, has been produced. No

(1) 9 Ch. D. 125. (2) [1900] 2 Ch. 388.

conveyance has been produced in which reference is made to covenants entered into by other purchasers, with the exception of a terrace of four houses known as Fairfield Terrace, as to which four houses there was undoubtedly a scheme. The maxim "Expressio unius" applies with great force here. There is no uniformity in the covenants in conveyances of different lots. There is no doubt a certain family likeness in this respect, that most of the conveyances contain covenants as to the building of private houses of varying values, from cottages to large dwelling-houses. There is nothing to shew that the purchaser of 1840 was aware that any of the earlier purchasers had entered into restrictive covenants of any kind, or that the purchasers of 1843 and 1846 were aware of the covenants entered into in or prior to 1840, or that the vendors were under any obligation as to the mode in which they would deal with the rest of the estate. I think, therefore, that the plaintiffs have failed in so far as they seek to establish a building scheme involving reciprocal obligations between all the purchasers.

As to the second proposition the plaintiffs have a more plausible case, but I think they fail in establishing it. It is plain that they are not assignees of the covenant, of the existence of which they were not aware. It is equally plain that there is nothing in the deed of 1840, or in any document prior or subsequent thereto, to indicate that the covenant was entered into for the benefit of the particular parcels of which the plaintiffs are now owners. I cannot hold that the mere fact that the plaintiffs' land is adjacent and would be more valuable if the covenant were annexed to the land suffices to justify the Court in holding that it was so annexed as to pass without mention by a simple conveyance of the adjacent land.

The learned judge seems to have thought he could infer a building scheme from the fact that the vendors, who were trustees, at various times from 1833 onwards sold portions of the estate until the whole was disposed of in 1847. But, with great respect, that does not suffice. Nor do I feel able to infer that the benefit of the covenant passed to the predecessors of the plaintiffs as assignees.

In my opinion this appeal must be allowed and the action

C. A. 1909

REID v. BICKERSTAFF.

dismissed. The plaintiffs must pay the costs of the action and of the appeal.

BUCKLEY L.J. By deed dated November 20, 1840, one Rollo, the defendant's predecessor in title, for himself, his heirs, executors, administrators, and assigns, covenanted with his vendors, the Falkner trustees, in the terms of certain restrictive covenants relating to the user of the land which he purchased. Subsequently, in the years 1843, 1847, and 1848, the plaintiffs' predecessors in title became purchasers from the same vendors of certain other pieces of land lying within a short distance of the plot which in 1840 had been conveyed to Rollo. The plaintiffs' predecessors in title likewise entered into certain restrictive covenants affecting the parcels conveyed to them. There is no question but that the defendant as successor in title to Rollo is bound by the restrictive covenants contained in the deed of 1840. The question in this action is whether the plaintiffs are persons entitled to enforce those covenants.

When the plaintiffs' predecessors in title purchased they were not aware of the existence of the covenant of 1840. Their purchase deeds neither by way of recital nor in any other way referred to Rollo's purchase, and the plaintiffs' predecessors in title were, of course, under these circumstances not expressed to be assigns of Rollo's covenant. They do not seek to make any case based upon their being entitled to the benefit of the covenant as assigns of the covenant. They rest their case upon either one of two grounds—first, the doctrine of *Spicer* v. *Martin* (1) that there was a building scheme, or secondly, in the alternative, upon a contention based upon *Rogers* v. *Hosegood* (2), that Rollo's covenant had become annexed to the other land of the common vendors which the vendors retained when the conveyance of 1840 was made, and that the plaintiffs' predecessors in title became entitled to the benefit of Rollo's covenant as a thing annexed to the land, a thing which passed to them with the land as annexed to the land, and none the less because they did not know of its existence. I shall deal with these two contentions separately.

First as to the existence of a building scheme and the

(1) 14 App. Cas. 12. (2) [1900] 2 Ch. 388.

application of the doctrine of *Spicer* v. *Martin*. (1) For the application of the principle of that case it is, I think, essential to establish as matter of fact the following state of things: that the vendor expressly or by implication contracted with the defendant in the action or his predecessor in title (whom I will call the purchaser) upon the footing that at the date of that contract the vendor told the purchaser that he was proposing to deal with a defined estate in a defined way, and that he offered to sell to the purchaser a plot forming a part of that defined estate on the terms that the purchaser should enter into such restrictive covenants relating to his plot as the scheme contemplated upon the footing that the purchaser should reciprocally have the benefit of such restrictive covenants relating to the other plots on the estate as were indicated by the scheme. There can be no building scheme unless two conditions are satisfied, namely, first, that defined lands constituting the estate to which the scheme relates shall be identified, and, secondly, that the nature and particulars of the scheme shall be sufficiently disclosed for the purchaser to have been informed that his restrictive covenants are imposed upon him for the benefit of other purchasers of plots within that defined estate with the reciprocal advantage that he shall as against such other purchasers be entitled to the benefit of such restrictive covenants as are in turn to be imposed upon them. Compliance with the first condition identifies the class of persons as between whom reciprocity of obligation is to exist. Compliance with the second discloses the nature of the obligations which are to be mutually enforceable. There must be as between the several purchasers community of interest and reciprocity of obligation.

Upon the facts of this case there was, in my opinion, no such building scheme. I find it impossible to say either, first, what were the lands to which the building scheme extended, or, secondly, what was the point of time at which a building scheme relating to those lands was adopted, or, thirdly, what were the respective restrictions to be imposed upon the several plots of land lying within that estate. On November 20, 1840, was there any, and, if so, what, building scheme? What benefit was Rollo

(1) 14 App. Cas. 12.

C. A. 1909 REID v. BICKERSTAFF. Buckley L.J.

reciprocally to enjoy, and as against what other parties, for the restriction which according to the respondents was imposed upon him for the benefit of other purchasers from the common vendors? I find it impossible to answer those questions. Before 1840 there had been many sales. In one particular case—Fairfield Terrace—there was a building scheme extending over defined plots and expressed in defined terms. As regards the rest of the estate I find nothing of the kind. There were a number of detached sales at intervals with restrictive covenants of which nothing more can be said than that they have some features in common. There was an attempted or proposed sale by auction in 1835. Nothing is known as to the conditions then imposed, or whether among them there were contained any restrictive conditions. No sale was made at the auction. Subsequent sales were made of the nature above described. In that state of facts came the deed of 1840. Upon the face of that deed there is not a trace of any building scheme. Its language is in effect inconsistent with a then existing building scheme or with any intention that the restrictive covenants in that deed should enure for the benefit of any other plots on any other lands of the vendors. The mere fact that the vendors of that deed had other adjoining lands is quite insufficient to establish that the covenant which they took was a covenant imposed for the benefit of purchasers of adjoining lands. For this proposition it is sufficient, I think, to refer amongst the numerous cases to *Master* v. *Hansard* (1) and *Renals* v. *Cowlishaw*. (2) Joyce J., who saw the witnesses, says himself that it is not proved that the sales were in pursuance of a building scheme, but only that he has no doubt whatever that it was so, and that he feels no serious difficulty in inferring that there is enough to satisfy him that a general scheme existed.

Upon the question of fact I cannot doubt myself that the evidence of the documents and dealings in this case falls very far short of establishing and indeed, in my opinion, does not tend in any way to establish the existence of a building scheme within *Spicer* v. *Martin*. (3)

(1) 4 Ch. D. 718.

(2) 9 Ch. D. 125; 11 Ch. D. 866.

(3) 14 App. Cas. 12.

But, secondly, was Rollo's covenant so annexed to the adjoining or other lands of the vendors as that on their subsequent sale to the plaintiffs' predecessors in title the covenant passed with the land as something annexed to the land? In *Rogers* v. *Hosegood* (1) the deed containing the covenant sought to be enforced expressed upon its face that the covenant was entered into with the intent that it might bind the premises conveyed, into whosesoever hands the same might come, and might enure to the benefit of others claiming under the vendors all or any of their lands adjoining or near to the premises. In other words, the deed expressed that the covenant was taken, not for the benefit of the vendors, but for the benefit of the other lands of the vendors. Upon this point the language of Hall V.-C. in *Renals* v. *Cowlishaw* (2) seems to me perfectly plain. The plaintiffs in this case cannot as assigns of the common vendors claim the benefit of Rollo's restrictive covenant unless it appears that the plaintiffs' predecessors in title acquired their property with the benefit of Rollo's covenant, for which purpose "it must appear," says the Vice-Chancellor, "that the benefit of the covenant was part of the subject-matter of the purchase" made by the plaintiffs' predecessors in title. "Is there any case," said James L.J. in *Renals* v. *Cowlishaw* (3), "to shew that if the owner of 100 acres sells an acre, taking a restrictive covenant, and sells the remainder in lots of an acre each, every one of the ninety-nine purchasers can enforce the covenant against the purchaser of the first acre?" This was an interlocutory observation. In giving judgment his language is as follows: "To enable an assign to take the benefit of restrictive covenants there must be something in the deed to define the property for the benefit of which they were entered into." Where a vendor takes from a purchaser a restrictive covenant, it may be that he takes it for purposes of his own, or it may be that he takes it for the benefit of the land which he is retaining after the sale on which the restrictive covenant is entered into. If the vendor is subsequently selling all the retained land, it may be that this is an element which may lead to the inference that he intended to pass with that land the benefit

(1) [1900] 2 Ch. 388. (2) 9 Ch. D. 130.
(3) 11 Ch. D. 867, 868.

C. A. 1909 REID v. BICKERSTAFF. Buckley L.J.

of the restrictive covenant. But this even does not follow, for, as was pointed out by Selwyn L.J. in *Keates* v. *Lyon* (1), it may be that he intended the restrictive covenant to enure for his own benefit so as to protect other land to which he was not at the time, but expected afterwards by inheritance or purchase to become, entitled, and for whose protection the restrictive covenant would be valuable. It is not necessary, however, in the present case to deal with the question as it arises where the vendor sells the whole of the retained land. The plaintiffs were but intermediate purchasers of certain plots in the course of sales which the Falkner trustees were from time to time making of portions of the land retained when Rollo bought. There was nothing to annex Rollo's covenant to the land such as there was in *Rogers* v. *Hosegood*. (2) The plaintiffs' predecessors in title did not know of the existence of the covenant. Under these circumstances *Renals* v. *Cowlishaw* (3), I think, is a plain authority that the plaintiffs here cannot succeed unless they shew that the benefit of Rollo's covenant was part of the subject-matter of the purchase made by their predecessors in title. There is, of course, nothing to shew anything of the kind.

For these reasons I think that the plaintiffs cannot sustain either of the two contentions to which I have referred and that they are not entitled to sue in respect of Rollo's covenant. It follows that this action, in my opinion, fails, and that the appeal ought to be allowed and the action dismissed with costs.

KENNEDY L.J. It is not, I think, improbable that if we knew all the facts in regard to this case as they happened the judgment under appeal would be justified. The lapse of sixty and more years since the predecessors of the plaintiffs and the defendant respectively bought from the trustees of the Falkner estate has no doubt done its natural work in blurring or in part effacing the history of the material epoch. From the evidence as it stands, I do not feel myself entitled to draw the inference which Joyce J. was obliged to draw in order to justify his conclusion in favour of the plaintiffs. In differing from it I do so

(1) L. R. 4 Ch. 227. (2) [1900] 2 Ch. 388.
(3) 9 Ch. D. 125; 11 Ch. D. 866.

with some regret. The result of the defendant's success in this action opens the door to serious inroads upon the comfort and the material interests of a large number of persons who either as owners of house property or as tenants benefit by the amenity of the Falkner estate, which, as a whole, with the principal exception of the outlying strip along the Prescot Road, has been developed as a residential area, with dwelling-houses for the most part built thereon in accordance with restrictions, though by no means uniform restrictions, which were imposed upon the original buyers by the Falkner trustees.

But we are bound to deal with the case upon the evidence as it stands, and to shun conjecture, however plausible and attractive, by keeping carefully within the bounds of legal inference; and, after scrutinizing that evidence with the valuable help of the arguments of counsel on both sides, I find myself forced to the conclusion that the plaintiffs' proof falls short of that which is requisite in order to establish the existence of reciprocal obligations, such as come into being in the case of the sale of land in lots under a building scheme, according to the law as stated by Lord Esher M.R. in *Nottingham Patent Brick and Tile Co.* v. *Butler* (1) and in the judgments in the earlier cases of *Keates* v. *Lyon* (2) and *Renals* v. *Cowlishaw* (3), and the recent case of *Elliston* v. *Reacher* (4); and also, in regard to the plaintiffs' alternative case, falls short of establishing such an annexation of the benefit of the restrictive covenant imposed by the vendors upon the defendant's predecessor in title to the lands of the vendors afterwards sold by them to the plaintiffs' predecessors in title, as must be established by the plaintiffs in order to succeed upon the principle of the decision of the Court of Appeal (affirming my brother Farwell) in *Rogers* v. *Hosegood.* (5)

In other words, the plaintiffs have failed to satisfy me either that (1.) there was a known general building scheme relating to a definite area and including the lands now held by the plaintiffs and the defendant, and in part execution of which the original

(1) 16 Q. B. D. 784.
(2) L. R. 4 Ch. 218.
(3) 9 Ch. D. 125; 11 Ch. D. 866.
(4) [1908] 2 Ch. 374, 665.
(5) [1900] 2 Ch. 388.

C. A. 1909 REID v. BICKERSTAFF. Kennedy L.J.

sales of the Falkner trustees to the plaintiffs' and the defendant's respective predecessors in title took place—and it is upon this basis that I understand the judgment of Joyce J. to proceed—or (2.) that we can properly find in the evidence proof of a sufficient legal link such as (in the absence of a building scheme) must be established by the plaintiffs (if they are to succeed in this action) to connect the restrictive obligation imposed by the Falkner trustees upon the defendant's property when they sold it to the defendant's predecessor, with the rights, whatever they are, which the plaintiffs' predecessors acquired by virtue of the conveyance to them when they subsequently became purchasers of other adjoining lands of the same vendors, but not assignees of the restrictive covenant by which the defendant's predecessor in title bound himself to the common vendors.

I agree that this appeal must be allowed.

Solicitors for appellant: *Neave, Bretherton & Morton, for Woodburn & Holme, Liverpool.*

Solicitors for respondents: *Halse, Trustram & Co., for J. F. Read & Brown, Liverpool.*

G. A. S.

C. A.
1909
June 15.

In re LORD CHESHAM'S SETTLEMENT.
VISCOUNT VALENTIA *v.* LADY CHESHAM.

[1908 C. 2188.]

Heirlooms—Trust of Chattels as—Construction—To be enjoyed with Mansion House—Tenant in Tail—Vesting—Intention—Actual Possession.

By a settlement of real estates made in 1877, plate, pictures, and chattels were assigned to trustees "upon trust to permit the same to be used, held, and enjoyed with the mansion house aforesaid by the person who for the time being shall be entitled to the said mansion house under the limitations thereof herein contained," yet so that for the effect of transmission they should not vest absolutely in any person thereby made tenant in tail male by purchase who should not attain the age of twenty-one years.

The eldest son attained twenty-one years but died in the lifetime of the tenant for life. On the death of the tenant for life in 1907, the second son, an infant, claimed to be entitled to these heirlooms as tenant in tail male in possession:—

Held (reversing the decision of Eve J.), as a question of construction, that there was sufficient indication of intention on the part of the settlor that these heirlooms should go with the mansion house and vest only in a tenant in tail male in possession, and, consequently, that they vested in the second son, though liable to be divested in the event of his dying under twenty-one.

Construction put upon this clause by Chitty J. in *In re Lord Chesham*, (1886) 31 Ch. D. 466, adopted.

APPEAL from a decision of Eve J. which raised the question whether, upon the construction of certain deeds of disentail and resettlement, the chattels and effects thereby settled as heirlooms vested absolutely in the eldest son of the third Baron Chesham, who attained twenty-one and died without coming into possession of the settled estates, or whether they vested in the second son, the present Lord Chesham, who was an infant, subject to being divested in the event of his death under twenty-one.

By a disentailing deed of November 15, 1872, all the real estates devised by the will of the late Earl of Burlington, which included a mansion house at Latimer, in the county of Bucks, were disentailed and resettled to such uses as William George, second Baron Chesham, and Charles Compton, afterwards third

C. A. 1909 — CHESHAM'S (LORD) SETTLEMENT, *In re.* VALENTIA (VISCOUNT) *v.* CHESHAM (LADY).

Baron Chesham, should jointly appoint; and "all the plate china glass books household effects and furniture pictures prints and drawings lately in or belonging to Burlington House" were assigned to trustees upon trust to permit the same to be enjoyed with the said mansion house at Latimer, in precisely similar words to those used in the subsequent settlement.

By a settlement of November 12, 1877, made on the marriage of Charles Compton, afterwards third Baron Chesham, he and his father appointed the real estates comprised in the disentailing deed of November 15, 1872, under the joint power of appointment contained therein, to uses under which the second Baron Chesham became first tenant for life, and the third Baron Chesham became tenant for life in remainder expectant on the death of his father, with remainder to the first and every other son successively of the said third Baron Chesham in tail male, with remainders over: the said plate, china, glass, books, household effects and furniture, pictures, prints, and drawings lately in or belonging to Burlington House were also appointed to trustees "Upon trust so far as the rules of law and equity will allow to permit the same to be used held and enjoyed with the mansion house called Latimer aforesaid by the person or persons who for the time being shall be entitled to the said mansion house under the limitations thereof herein contained, yet so that for the effect of transmission the same shall not vest absolutely in any person hereby made tenant in tail male or in tail by purchase who shall not attain the age of twenty-one years but who nevertheless shall be entitled to the use and benefit thereof during minority."

The third Baron Chesham had two sons—(1.) Charles William Hugh, who was born in September, 1878, and attained the age of twenty-one years, but was killed in South Africa in June, 1900, intestate and unmarried; and (2.) John Compton, who was born in June, 1894.

In November, 1907, the third Baron Chesham died, and John Compton thereupon became fourth Baron Chesham and tenant in tail male in possession of Latimer House and the other hereditaments settled by the settlement of November 12, 1877. There being some question as to the vesting of these heirlooms in the

eldest son, the trustees of the settlement took out a summons asking whether, upon the true construction of the above-mentioned deeds, the chattels and effects thereby settled as heirlooms vested absolutely in the eldest son of the third Baron Chesham, or whether they would vest in the younger son, the fourth Baron Chesham, on his attaining the age of twenty-one years.

Eve J. held that the heirlooms vested absolutely in the eldest son and passed, on his death intestate, to his legal personal representatives.

The fourth Baron Chesham, the infant tenant in tail male, appealed.

P. O. Lawrence, K.C., Upjohn, K.C., and *T. T. Method*, for the appellant. The words "to be used held and enjoyed with the mansion house called Latimer" import possession, and shew a clear intention that, so far as the perpetuity rule will admit, only some one entitled in possession to the real estate was to have "the use and enjoyment" of these heirlooms.

[FARWELL L.J. This settlement and this particular clause as to the heirlooms were considered and interpreted by Chitty J. in *In re Lord Chesham.* (1)]

That decision is in favour of the appellant; the words "with the mansion house" cannot be treated as mere surplusage. The present case is distinguishable from *Foley* v. *Burnell* (2) on the ground that there is a clear indication that the enjoyment of the real estates and mansion house is coupled with the use and enjoyment of the heirlooms. When *Foley* v. *Burnell* (2) was decided it was regarded as doubtful whether a condition of actual possession could be imposed, but all difficulty on that ground is removed by *Lord Scarsdale* v. *Curzon* (3), which shews that the question is one of intention, to be gathered from the words of the particular instrument: the words in the present case are not "doubtful words" as mentioned in rule 4 of *Lord Scarsdale* v. *Curzon.* (3) Here we have the provision that the user of the heirlooms is to go with the mansion house, and we have the decision of Chitty J. (4)

(1) 31 Ch. D. 466.
(2) (1783) 1 Bro. C. C. 274; (1785) 4 Bro. P. C. 319.
(3) (1860) 1 J. & H. 40.
(4) 31 Ch. D. 471.

C. A. 1909

CHESHAM'S (LORD) SETTLEMENT, *In re.* VALENTIA (VISCOUNT) *v.* CHESHAM (LADY).

on this very settlement that these heirlooms "are in effect annexed to the house, and cannot be removed from it . . . . without a breach of trust." *In re Angerstein* (1) and *In re Fothergill's Estate* (2) are in favour of the appellant's contention. As a question of construction, therefore, these heirlooms did not vest absolutely in the eldest son, who never was tenant in tail male in possession, but have vested in the present Lord Chesham, liable to be divested, under the defeasance clause, in the event of his not attaining twenty-one years. The appeal, therefore, should be allowed.

Jessel, K.C., and *Corrie*, for the legal personal representatives of the eldest son. The authorities shew that there must be sufficient in the language of the particular instrument to satisfy the Court conclusively that it was not intended that any person should take the heirlooms unless he became tenant in tail in possession of the settled estates. If this is not made out, effect must be given to the rule of construction settled by *Foley* v. *Burnell*. (3) In this case there are no plain words indicative of possession sufficient to get over the established rule of construction. The mere fact that Latimer House is mentioned in the trust is not sufficient. In *In re Fothergill's Estate* (2) and in *In re Angerstein* (1) the words were in the "actual" possession of the real estates. *Lord Scarsdale* v. *Curzon* (4) was a very special case, and Wood V.-C. relied on the word "actual" as only one of several indications of the intention of the testator. *In re Johnson's Trusts* (5) explains *Lord Scarsdale* v. *Curzon*. (4) The words here are "the person for the time being entitled to the said mansion house under the limitations thereof herein contained"; the eldest son was at his death entitled to the mansion house as tenant in tail male expectant on the death of his father. Theobald on Wills, 7th ed. p. 720, correctly states the rule: "a gift of . . . . heirlooms to the persons for the time being entitled to real estate, ... vests absolutely . . . . in the first tenant in tail at birth, whether he comes into possession or not." The defeasance clause carefully deals with the case of an

(1) [1895] 2 Ch. 883.
(2) [1903] 1 Ch. 149, 156.
(3) 1 Bro. C. C. 274; 4 Bro. P. C. 319.
(4) 1 J. & H. 40.
(5) (1866) L. R. 2 Eq. 716.

infant tenant in tail, but does not deal with the case of a tenant in tail in remainder who is not an infant.

On the appellant's contention there could not have been any resettlement of these heirlooms by the eldest son had he lived to return from South Africa, because he was not in possession. The inconvenience of this is considered in Davidson's Precedents, 3rd ed. vol. iii. pp. 624—626, where this form of trust is recommended, and is the usual one. The question of the absolute vesting of these heirlooms was not raised before Chitty J. in *In re Lord Chesham* (1); the point there was one of election, and incidentally whether the then Lord Chesham, as tenant for life, had the use of these heirlooms without restriction as to the place of enjoyment. That decision, therefore, is not an authority on the construction of this clause, and in any case is not binding on this Court.

H. T. Method, for the trustees of the settlement.

COZENS-HARDY M.R. This is a case which is by no means easy, and but for the fact that this very settlement was construed by Chitty J. in the year 1886, I think I should have desired time to consider it, and should certainly have required to hear a reply. But although that decision is not binding upon us, it seems to me to be a sound decision, and one which ought to govern the present case. The material facts can be very shortly stated. [Having stated the facts and the question for decision, his Lordship continued:—] I do not think that there is now any possible doubt as to the legal principle which ought to be applied in cases like this, which for convenience I will call *Foley* v. *Burnell* (2) cases. The true principle is that, as you cannot strictly entail personal property, chattels which are given by reference to limitations in strict settlement of real estate vest absolutely in the first tenant in tail in esse. It is quite unimportant whether that tenant in tail only lives a day, or whether he lives to attain majority, but dies in the lifetime of his parent, the tenant for life. That was decided by *Foley* v. *Burnell* (2) in the House of Lords about a century and a quarter ago. But side by side with that there is of course this perfectly

(1) 31 Ch. D. 466. (2) 1 Bro. C. C. 274; 4 Bro. P. C. 319.

C. A. 1909

CHESHAM'S (LORD) SETTLEMENT, *In re.* VALENTIA (VISCOUNT) *v.* CHESHAM (LADY).

Cozens-Hardy M.R.

well settled rule, that subject only to your not infringing the rule against perpetuities you may, by sufficient words, indicate that the only person who is to have a transmissible interest in the heirlooms is a person who de facto becomes a tenant in tail in possession of the real estate by reference to the limitations of which the chattels are given.

The only question for this Court is whether or not there is sufficient in the language of the particular instrument to satisfy the Court—I do not like to use the word "conclusively," but to satisfy the Court—that it was not intended that any person should take unless he became tenant in tail in possession of the settled estate. Now we have to apply those principles to this particular instrument: the trust is very short, and I will read the whole of the words. [His Lordship read the trust, and continued:—] Now what is the meaning of that trust? The meaning seems to me to be this: No person can claim to be a beneficiary under that trust unless he can say:—I am entitled to the possession and enjoyment of the mansion house and I claim under this trust to have the use and enjoyment of these heirlooms, not as severed heirlooms, but with the mansion house, just as much as though they were freehold fixtures annexed to the mansion house in such a sense that it would be wrong for a person who is a limited owner to remove those articles from the mansion house, just as it would be wrong to remove fixtures strictly so called. If that be the true construction of this clause, it is plain that the elder brother never was in a position to enjoy these heirlooms, which he could only take as part of, or at least as annexed to, the mansion house. That is the view which was taken, not on an analogous or similar instrument, but on this very instrument, by Chitty J. in the case of *In re Lord Chesham.* (1) It arose there in a peculiar way, because under the will of the testator certain large benefits were given to Lord Chesham, the father of the present lord, and in that will the testator purported to give away some of these very heirlooms which were in settlement, the will being dated in 1878, and the settlement being dated in 1877. The question arose whether Lord Chesham was not bound to make

(1) 31 Ch. D. 466.

compensation to persons who were affected by his abstracting, so to say, the property passing by his will, i.e., these heirlooms, in which he had in fact an interest under the settlement of 1877. Chitty J. there had to consider the effect of this trust, and what he says is (1): "At the date of the will and the death of the late Lord Chesham the chattels were bound by the settlement of 1877. The legal property in the chattels was vested in the trustees of the settlement upon trust to permit them to be used, held and enjoyed with the mansion house called Latimer by the person or persons who for the time being should be entitled to the mansion house under the limitations of the settlement. For the younger sons it is argued" —they were the people who were saying that Lord Chesham was bound to make compensation—"that the effect of this trust was to make Lord Chesham (who is tenant for life of the mansion) tenant for life of the chattels without restriction as to the place of enjoyment. So to read the trust would be to strike out the words 'with the mansion house.' These words cannot be treated as mere surplusage; they are an essential part of the trust; and Lord Chesham is only entitled to the enjoyment of the chattels with the house. To hold otherwise would be to destroy an essential part of the trust. The chattels are in effect annexed to the house and cannot be removed from it (except for a temporary purpose, as repairs or the like) without a breach of trust." Now, adopting that construction, the whole of this clause is perfectly consistent, and the proviso at the end, which does not seem to me to help either Mr. Upjohn or Mr. Jessel, but to be really irrelevant to the present case, is perfectly intelligible in a proper case. The whole clause would then mean this: within the limits of the rule against perpetuities these chattels are to be annexed to and go with the possession of "Latimer." The tenant in tail, who is adult but who never becomes tenant in tail in possession, will not take them; but there may be an infant tenant in tail who becomes tenant in tail in possession, and then there is a restriction put upon it, that that infant tenant in tail is not to take as he would under the prior limitations, but he is only to have a limited use and enjoyment of them till he

(1) 31 Ch. D. 470.

C. A. 1909

CHESHAM'S (LORD) SETTLEMENT, *In re.* VALENTIA (VISCOUNT) v. CHESHAM (LADY).

Cozens-Hardy M.R.

attains twenty-one, and his title will only become absolute in the event of his attaining twenty-one. If he dies under twenty-one the trust will go over to the next tenant in tail in esse, who will then become the person entitled to the trust. For these reasons, without infringing in the slightest degree any of the principles laid down by the long series of authorities, to many of which our attention has been called, and with great deference to Eve J., whose attention was not called to the decision of Chitty J., I think that he has taken a wrong view of this particular clause, and that the appeal ought to be allowed, and the appellant to be held conditionally entitled to these heirlooms.

FARWELL L.J. I am of the same opinion. I do not think there is any doubt as to the law applicable to cases of this kind. It is a mere question of the construction of a particular document. Taking the law as laid down in *Lord Scarsdale* v. *Curzon* (1), the rule is, "First that an assignment or bequest of personalty, either immediate or by way of trust executed, to go according to the same limitations as real estate, vests it absolutely in the first tenant in tail of the realty immediately upon his birth." Then the fourth rule is, "Doubtful words tending to restrict the interest in the chattels to those who come into possession of the real estate, will not overrule the operation of the general canons of construction, or have the effect of suspending the interest until the time when possession of the realty is obtained."

In this case the question is one of construction. There are two sorts of trusts to be considered in a case like this, a trust such as in *Foley* v. *Burnell* (2), and in the case of the second gift in *In re Fothergill's Estate* (3), as stated by Swinfen Eady J., where under the trusts the persons entitled to the personalty were simply entitled in remainder without more—remainders that arose on the execution of the instrument or the death of the testator, as the case may be, and were not expressed to be contingent on any event. The present case is one in which the right of the person claiming in remainder

(1) 1 J. & H. 40, 50. (2) 1 Bro. C. C. 274; 4 Bro. P. C. 319.
(3) [1903] 1 Ch. 149.

is expressed and intended to be contingent. Swinfen Eady J. in *In re Fothergill's Estate* (1) puts it thus (2): "If the gift of personal estate be to the person actually seised at the death of the tenants for life, or to the person seised of the actual freehold, which is defined as freehold in possession, or there are other clear words referring to actual possession, a tenant in tail who dies before coming into possession is excluded." That appears to me to be perfectly accurate, and this particular case is an illustration of the last proposition. There are other clear words referring to actual possession. When I turn to the words themselves, the trustees are directed to permit the chattels "to be used held and enjoyed with the mansion house called 'Latimer' aforesaid by the person or persons who for the time being shall be entitled to the said mansion house under the limitations thereof herein contained." To paraphrase that, it appears to me to mean this: no one shall be entitled to claim the use and enjoyment of these chattels except in conjunction with the mansion house Latimer, and only if and when he is entitled to the possession of that mansion house, so that he is to enjoy them in situ where alone they are intended to be enjoyed; and notwithstanding the fact that the tenant in tail shall enter into such an enjoyment, if he happens to be an infant and dies under twenty-one, still then by the subsequent words they are not to vest in him. Those subsequent words appear to me not to have very much bearing on the case, but they may possibly help Mr. Upjohn, because they shew at any rate that the possession was the thing that was contemplated as giving a title to the tenant in tail. To my mind the first part of the trust shews clearly that it is a contingent trust, so that the cestui que trust cannot call upon the trustees to allow him to have any use and enjoyment under that clause, unless and until he is entitled to the actual use of Latimer House. I agree with the Master of the Rolls in thinking that we could not decide otherwise on this settlement without overruling Chitty J.'s decision in *In re Lord Chesham* (3), which I am not prepared to do.

(1) [1903] 1 Ch. 149. (2) [1903] 1 Ch. 156.
(3) 31 Ch. D. 466.

C. A. 1909

CHESHAM'S (LORD) SETTLEMENT, *In re.*

VALENTIA (VISCOUNT) *v.* CHESHAM (LADY).

KENNEDY L.J. I agree with the judgment pronounced by the Master of the Rolls, and with his reasons for it.

A declaration was accordingly made that the chattels were vested in the fourth Baron Chesham as the person entitled to the mansion house as tenant in tail male by purchase subject to be divested in the event of his dying under twenty-one years.

Solicitors: *Stow, Preston & Lyttelton*; *Corbin, Greener & Cook.*

W. C. D

C. A. 1909

June 16.

ATTORNEY-GENERAL *v.* WEST GLOUCESTERSHIRE WATER COMPANY.

[1908 A. 1117.]

Company—Waterworks—Statutory Powers—Incidental Powers—"Supply of Water"—Supplying Water outside Statutory Limits—Ultra vires—Injunction—West Gloucestershire Water Act, 1884 (47 & 48 *Vict. c. ccxlix.*), *ss.* 3, 4, 5, 6, 28, 34, 36, 56—*West Gloucestershire Water Act*, 1899 (62 & 63 *Vict. c. clviii.*), *ss.* 4, 12.

A water company authorized by their special Act to supply water to certain places, defined by the Act to be the limits of the Act, cannot supply water outside those limits, although not expressly forbidden by the Act to do so.

A water company, authorized by their special Acts to erect waterworks and supply water within certain limits which included the parish of A., agreed to supply water to W., the owner of property in the adjoining parish of H., and accordingly extended their main in the parish of A. to the boundary where it adjoined the parish of H., and then, at the cost of W., laid a main some distance along a highway in the parish of H. and thence laid pipes to W.'s property:—

Held, that the water company, on the construction of their special Acts, were not by virtue either of any express or incidental powers entitled to supply water outside their statutory limits.

Held, also, that the water company were supplying water to W., not at the point where their mains reached the boundary in the parish of A., but at the terminals on W.'s property where he received and applied it to his use.

Held, therefore, that the water company were acting ultra vires, and an injunction was granted at the suit of the Attorney-General.

Decision of Neville J., [1909] 1 Ch. 636, affirmed.

APPEAL from a decision of Neville J. (1)

The defendant company was incorporated by the West

(1) [1909] 1 Ch. 636.

Gloucestershire Water Act, 1884, for the purpose of making and maintaining waterworks and for supplying water within the limits prescribed by the Act, and for carrying on the business usually carried on by water companies. The Act incorporated the Waterworks Clauses Acts, 1847 and 1863, and divers other general Acts, and by s. 4 the limits of the Act for the supply of water were stated to be certain specified parishes and townships in the county of Gloucester. Those limits were extended by the West Gloucestershire Water Acts of 1887 and 1899 to certain other parishes in the counties of Gloucester and Somerset, including the parish of Almondsbury, adjoining the parish of Henbury in the county of Gloucester, but the parish of Henbury was not included within those extended limits. The parish of Henbury was within the limits of supply of the Bristol Waterworks Company, which was incorporated by an Act of 1846 for the purpose of supplying water to the city of Bristol and other places.

By an agreement dated May 4, 1908, the defendant company agreed with Sir George White, the owner of a residential property in the parish of Henbury, close to the boundary between that parish and the parish of Almondsbury, to supply water to his property for all purposes. Pursuant to this agreement the defendant company extended their main in the parish of Almondsbury to a point on the boundary between that parish and Henbury, and from that point, at the cost of Sir George White, they laid a main for a short distance along a highway in Henbury parish to a place at the roadside, where they erected a hydrant and a meter, and thence supply pipes were laid on to Sir George White's property. By the agreement the defendant company was to supply him by meter with a certain number of gallons of water per year.

In July, 1908, an action was commenced by the Attorney-General at the relation of the Bristol Waterworks Company (who were also plaintiffs), claiming a declaration that the defendant company were not entitled to supply water outside its statutory limits and an injunction to restrain them from so doing.

The plaintiff company's system had not reached that part of the parish of Henbury in which Sir George White's property

C. A. 1909 ATTORNEY-GENERAL v. WEST GLOUCESTERSHIRE WATER COMPANY.

was situate, but they alleged that his property was within their area of supply, and that they were ready and willing to do all necessary acts for supplying and to supply the same with water.

Neville J. held that the defendant company, on the construction of their special Acts, were acting ultra vires by supplying water outside their statutory limits, and granted an injunction accordingly.

From that decision the defendant company appealed.

Sir C. A. Cripps, K.C., and *Christopher James*, for the appellants, repeated the arguments used in the Court below (1), where also the material sections of the company's special Acts will be found set out.

Upjohn, K.C., and *W. M. Cann*, for the respondents, were not called upon.

COZENS-HARDY M.R. This is a case, no doubt, of some considerable importance. It raises the question whether a water company with that which, so far as I am aware, all water companies have, only a limited area of supply, can supply water to a person outside their own district over which no monopoly rights have been given. It is to my mind clear that the defendants, the water company, in a case like this can only justify the act on one of two grounds: they may justify it on the ground that there is some express power given to them in their Act of Parliament authorizing them to supply water outside the limits of their district, and if they succeed in that there is an end of the case; but if that argument fails, then they may seek to support the contention on the ground that what they are doing is merely incidental to the exercise of the statutory powers which are conferred upon them by Parliament. In approaching this case, and before considering the language of the Acts of Parliament in question, one must look at the fundamental principle laid down in the cases, that a statutory company is bound hard and fast within the limits of its constitution, or perhaps, to phrase it more accurately, within the limits of its objects as defined by the statute, and that it is idle merely to say

(1) [1909] 1 Ch. 639.

that it would be very advantageous for them if they were allowed to do that which Parliament has not authorized them to do. A company of this kind is not like a private individual, who in the conduct of a particular business may think, and justly think, "my business which I am carrying on would be greatly benefited and would be much more easily carried on if I added another kind of business to it." Parliament does not allow that, nor does the law allow it, in the case of corporations claiming under statutory titles.

Now what is the position of the company here? It is the West Gloucestershire Water Company, and it was created by an Act of Parliament in 1884. It was founded for the supply of water to certain parishes named in the Act, of which the parish in question here is not one, but by s. 4 of that Act it is provided that the limits of this Act for the supply of water shall be certain parishes there named. The company is established, by s. 6, "for the purpose of making and maintaining the waterworks and for supplying water within the limits of this Act and for carrying on the business usually carried on by water companies and generally for carrying the powers of this Act into execution." As a matter of construction of the Act and the application of the general law of which this is the embodiment, it seems to me that that section must be read as applying not merely to the first branch of it, to that which is express, but to the other branch of it, "within the limits of this Act." Then we go on to the other sections which give power to own land and to construct works; the water is drawn up by suction from the subjacent strata, and the water which is to be supplied is to be supplied at a certain pressure. Then we come to s. 34. Sect. 34 imposes an obligation upon the company to supply water for domestic purposes to residents living in the district who are desirous of having it. It imposes an obligation on the company to supply water for domestic purposes only at a rate charge. That is the only positive obligation imposed upon the company with reference to the supply of water. But then the Legislature contemplated that which I think is sufficiently obvious, which has been brought to the notice of some of us lately by the demands made by the Metropolitan Water Board, that water

C. A. 1909 — ATTORNEY-GENERAL v. WEST GLOUCESTERSHIRE WATER COMPANY. — Cozens-Hardy M.R.

may be desired to be obtained for purposes other than domestic, and, moreover, that there may be circumstances under which a water consumer may be very desirous of obtaining that which the company would be quite willing to give him under certain circumstances, namely, a supply of water for all purposes, both domestic and otherwise, at a charge differing from and less than the rate charge. Many instances can be given of that—a supply of water for a big warehouse, or where the amount of water consumed is something very much less than would be represented by the rate charge. Sect. 36, accordingly, says this: "Subject to the provisions of this Act" (which only deals with the limits of the Act) "the company may supply water for other than domestic purposes on such terms and conditions as the company think fit"—no obligation, but they may do it—"and may enter into agreements for the supply of water by measure either for domestic or other purposes"; that is to say, it deals with water other than for domestic purposes, and it authorizes a charge for water either by measure or by rate for domestic or other purposes, provided that the special powers given under this Act for supplying for business purposes or non-domestic purposes do not interfere with the supply for domestic purposes. It has been argued by Sir C. A. Cripps that the effect of this clause is that, subject to the due performance by the company of their obligation to supply people within the area for domestic purposes, there is nothing to prevent their supplying water either by measure or by rate to persons outside the area. I feel myself entirely unable to assent to that view. It seems to me that it is inconsistent with the express language of the earlier sections of the Act with which I have dealt, and with the general purview and intention of the Act. I think that the idea, the fundamental idea, that the limit of area is the limit within which the supply must be given and taken is confirmed by reference to s. 56, a section, I agree, which it is not altogether easy to construe, but which seems to me to bear out that view. That section says, reading it shortly, the company may enter into and carry into effect agreements with a class of persons within the limits of this Act for supply by the company to that class of persons

whether in bulk or otherwise and for what purposes soever for use within such limits. Then it is provided that such supply of water shall not interfere with the supply of water for domestic purposes within the limits of supply; again emphasizing that they have no power to enter into a contract with these persons, whether in bulk or otherwise, except for use within the limits of the area. In my view it is impossible to successfully contend that this Act expressly authorizes the supply of what is called the margin of water, or the surplus water, to people who are willing to take it outside the limits of the area. I need not refer in detail to the Act of 1899. That is the Act which extended and enlarged the limits of supply so as to include, inter alia, the parish of Almondsbury. Sect. 4 begins "The limits within which the company may supply water" shall include these parishes, and s. 12 contains words corresponding to s. 56—the difference is not substantial, but there is a slight difference in language—and the provisions of the earlier Act of 1884 apply to the extended district as well as to the original district. I therefore come to the conclusion that there is not to be found in this Act any express power enabling the company to supply water outside the area of supply.

Then is it possible to maintain the contention of the appellants on the ground that, although there is no express power, what they are doing is incidental to the statutory powers which they possess? To say that the supply of water outside the district is incidental to the supply of water inside the district is, to say the least, rather a startling proposition. It is really an attempt, not for the first time, to treat the phrase "incidental powers" as though they were equivalent to powers which it would be very convenient to exercise with statutory powers. The Courts have held, not once or twice, but repeatedly in the course of recent years, the opposite view. I only refer amongst many other authorities to the case of *London County Council* v. *Attorney-General* (1), in which the Court of first instance, the Court of Appeal, and the House of Lords all emphatically laid down the doctrine that the phrase "incidental powers," or whatever equivalent language is used, must be read strictly, and not in

(1) [1902] A. C. 165.

C. A. 1909

ATTORNEY-GENERAL v. WEST GLOUCESTERSHIRE WATER COMPANY.

Cozens-Hardy M.R.

the large sense in which it is sought to be used here. Thus far I have assumed that the supply of water is outside the district. In fact what is done is that the water is taken in the company's pipes to the outside limit of their district; they have then laid down pipes at the cost of the adjoining owner, Sir George White, and in that way they have supplied his house and premises with water. The learned judge has held that that is a supply of water to Sir George White outside the district, and it is a fallacy to say that they only supply it outside their district at the end of their pipes where they run into his. In other words, he has held that the true view is that the supply of water in this Act means the supply of water for use, and that the water is supplied, not at the boundary line dividing the two areas, but at the place where it is put in a position in which Sir George White uses it, whether it be in cisterns or at taps—in either case in a position outside the limits of the Act.

For these reasons, which are substantially those of Neville J., I think the appeal fails and must be dismissed with costs.

FARWELL L.J. I am of the same opinion. It is well settled that a statutory company can do such acts only as are authorized by express words or necessary inference from the statute creating it. As to express words I agree with the Master of the Rolls, and I will not go through all the sections in detail again, but I will only say this: Under s. 6, and also the preamble, which shews the object of the Act, inasmuch as the company is established for the purpose of supplying water within the limits of this Act, it is impossible to read the next words "and for carrying on the business usually carried on by water companies" as extending their power of carrying on their business of supplying water outside the limits of this Act; it would be to make that section absurd. The only section which is relied on as giving express power is s. 36. Sect. 36 is expressed to be made "subject to the provisions of this Act" for the very purpose of shewing that the generality of the power to supply water is not to be unrestricted, but confined to the limits of the area stated. If that be so, it seems to me to be absolutely fatal to the appellant. That there can be no necessary or reasonable

implication of power to do something different, in addition to the reasons of the Master of the Rolls, which are quite sufficient in themselves to dispose of the case, it is impossible to treat the power to supply water within area A as incidental to power to supply water in area B, because the two are similar powers and extend to different areas; still more is it impossible, when it is settled that s. 36 gives express authority to enter into agreements such as the present within the area, to infer, in the teeth of that, an incidental power to enter into such agreements outside the area. Those two grounds seem to me to dispose conclusively of any question of the incidental power. Sir C. A. Cripps suggested the analogy of the railway company, and on that I may refer to *Attorney-General* v. *Manchester Corporation.* (1) I will read one paragraph of my own judgment at p. 656. There the Manchester Corporation had power to use all tramways belonging or in lease to the corporation, or on which they had power to place or run carriages, "for the purpose of conveying and delivering animals, goods, minerals, or parcels." The corporation worked a large system of tramways, of which they were owners or lessees, extending all over the city and suburbs of Manchester and a considerable surrounding district. They had commenced or advertised their intention to commence a general parcels delivery business within and beyond the area covered by their tramways, not confined to parcels and goods carried on their tramways. The action was brought by the Attorney-General on the relation of the Manchester ratepayers to restrain the carrying on of such a business. At p. 656 there is this: "But this is all restricted to goods which travel along the tramways, or some part thereof; there is nothing in the Acts to authorize the corporation to act as carriers generally without reference to their tramways. The question, as is pointed out in *Attorney-General* v. *London County Council* (2), is not whether the business can be conveniently or advantageously conducted with the tramway business, but whether it is by necessary implication incidental or accessory to it, and I think that it is not. To collect and deliver parcels for the tramway is fairly incidental; to collect and deliver parcels

(1) [1906] 1 Ch. 643. (2) [1901] 1 Ch. 781.

C. A. 1909

ATTORNEY-GENERAL v. WEST GLOUCESTERSHIRE WATER COMPANY.

Farwell L.J.

outside the radius of the tramway, and without any connection with the tramway, is not incidental to the tramway business, but distinct from it."

The only other point is this. It is suggested that this, as in *Attorney-General* v. *Great Eastern Ry. Co.* (1), is a case where the Attorney-General is interfering, and that there is, even assuming that it is ultra vires, no necessity for the interference. In my opinion that is not so. Of course we do not consider the question whether the Attorney-General has exercised his discretion wisely or not—that is for him—nor do we say in any case that because the Attorney-General has exercised his discretion in a particular way the Court is bound to grant an injunction, even although he has made out his case. But in this particular case I think it is most material to consider that which is now becoming every day a more pressing danger, and that is the depletion in various districts of the underground reservoirs of water for the benefit of some other district or some big town. To say that a water company which has power to supply water to a particular district is entitled, as Sir C. A. Cripps puts it, to make a surplus supply, and then to say because they have a surplus which they have pumped, not because their own district requires it, but in order to get a large supply in hand, they can make what use they please of that water, would be most disastrous; such attempted user is certainly a ground for the interference of the Attorney-General, and of the Court by granting an injunction at his instance. For these reasons I think this a proper case for an injunction.

KENNEDY L.J. I am of the same opinion. With regard to the question of supply, I do not think there can be any doubt that there was a supply outside the area in respect of which statutory powers were obtained by the West Gloucestershire Water Company.

As to the only other question, which has been already so fully dealt with, for myself I shall say very little. First of all, can it be said, upon a right interpretation of the relevant statutes from 1884 onwards, that powers are given to this statutory company

(1) (1879) 11 Ch. D. 449.

to supply water for reward to persons outside the area? I do not think that the provisions are in all respects so clear as one would desire, but it appears to me that it lies upon the present appellants to shew that the judgment of Neville J. was wrong by shewing that there are powers given to them to do something of this kind, which is certainly beyond that which is the statutory object of the company's existence, the reason for the grant of a monopoly. Now it is not suggested, as it seems to me, in any of the sections which have been referred to that the company is one which is to give great general advantages to the whole of Gloucestershire, or to an unnamed area, but it is to have a monopoly given to it for the object of supplying a limited and defined area, and, that being so, it seems to me one ought to require clear proof that upon the true construction of the statute there has been granted this additional or supplementary right of supplying water by voluntary agreement to persons outside the area within which the company is bound to supply water and has corresponding privileges for supplying it. If such powers are not to be found within the four corners of the Act, then the supply which it is sought here to give under the agreement to Sir G. White could only be justified if they were held to be reasonably incidental to the powers which are expressly given to the company. It seems to me impossible to say that the granting of a supply of water to a person outside the area is reasonably incidental to the supply of water, under statutory rights and obligations, to persons within the area. I do not see how the word "incidental" can have any natural relation to the act of supplying outside in reference to the supply of water within the area. If the statutory duties of the company are performed, they involve the existence within the control of the West Gloucestershire Company of water collected for the purposes of performing their statutory duties, and it appears to me it would be highly dangerous to encourage a corporation of this kind to do more than is absolutely necessary by saying to them, "if you collect any surplus water you can supply it, on any terms you like, to persons outside the area in regard to which alone you have come to Parliament for powers." As Farwell L.J. has pointed out, the collection of subterranean

C. A. 1909 ATTORNEY-GENERAL v. WEST GLOUCESTERSHIRE WATER COMPANY.

water in the way this company must collect it in order to obtain the water to carry out its parliamentary duties may be a very serious matter to the district. I do not see how, either as a matter of business or as a matter of public usefulness, the supply of water outside the area can be treated as incidental to the power to supply it within the area.

Solicitors for appellants: *Stanley, Wasbrough, Doggett & Baker, for Stanley, Wasbrough & Co., Bristol.*

Solicitors for respondents: *Woodcock Ryland & Parker, for Edward Gerrish & Co., Bristol.*

G. A. S.

NEVILLE J. 1909 *May* 26, 27; *June* 11.

CRASTER *v.* THOMAS.

[1907 C. 3763.]

Administration—Will—Executors in England—Indian Assets—Letters of Administration as on an Intestacy obtained by Fraud in India—Sale of Indian Assets by Fraudulent Administrator—Purchaser for Value without Notice—Revocation of Indian Letters of Administration—Title of Executors—The Indian Succession Act, 1865 (*Act X. of* 1865), *ss.* 2, 3, 5, 179, 180, 187, 188, 190, 191, 234, 242, 243, 260, 262, 269, 278.

In 1898 a testator, domiciled in England, died possessed of English and Indian assets. The Indian assets comprised shares in the Bank of Bengal, and the share certificates were in the custody of C., the testator's agent at Calcutta. The executors in England remained in ignorance of the testator's Indian assets until 1903, when they discovered that in 1902 C. had by fraud obtained from the High Court at Calcutta the grant of letters of administration to the testator's Indian assets as on an intestacy, and acting as such administrator had sold the bank shares in the open market at Calcutta and had squandered the proceeds. Some of the shares C. so sold and transferred to T., who was a purchaser for value without notice. C. was prosecuted for the fraud and convicted, and the grant of letters of administration to him was revoked, and fresh letters of administration with a copy of the testator's will annexed were granted to the Administrator-General of Bengal. In an action by the executors against T. and the Administrator-General claiming to be entitled to the shares T. had purchased from C. on the ground that the grant of letters of administration to the latter was void ab initio:—

Held that, on the true construction of the provisions of the Indian

Succession Act, 1865, the grant of letters of administration to C. was not void ab initio, but only void as from the date of the order of revocation.

Held, therefore, that the sale of the shares by C., qua administrator, to T. was valid and conferred on the latter a good title to the shares.

Ellis v. *Ellis*, [1905] 1 Ch. 613, distinguished.

ACTION.

IN August, 1898, Edmund Craster Craster, a retired Bengal civilian, died domiciled in England, having by his will appointed the plaintiffs to be the executors and trustees thereof and devised and bequeathed to them his residuary real and personal estate upon certain trusts. The testator died possessed of considerable property in England and in India. The testator's Indian assets consisted (inter alia) of 86½ shares in the Bank of Bengal, and the certificates of the shares were in the custody of his agent Cowie, a solicitor at Calcutta, who collected and received the dividends on the shares for him. At the testator's death the plaintiffs looked through the testator's papers and found no reference to his Indian assets, and remained in ignorance of their existence until 1903, when, acting on information they received, they caused a more thorough search to be made amongst the testator's papers and found his correspondence with Cowie. This led to the discovery that in August, 1902, Cowie in conjunction with one Smalley had, by means of a forged power of attorney suppressing the will and purporting to be executed in his favour by one Henry Craster (a fictitious person), alleged to be the sole heir and next of kin of the testator, obtained from the High Court at Calcutta the grant to himself of letters of administration to the Indian assets of the testator as on an intestacy, and had during 1903 sold the testator's shares in the Bank of Bengal in the open market at Calcutta to various persons and had squandered the proceeds. Twenty-eight of these shares Cowie, as such administrator, had so sold and transferred to the defendant Thomas, who was a purchaser for value without notice.

Cowie and Smalley were arrested and prosecuted for the fraud and were convicted and sentenced to terms of imprisonment, and in April, 1904, the High Court of Calcutta revoked the letters of administration that had been granted to Cowie, and granted fresh

NEVILLE J. 1909 — CRASTER v. THOMAS.

letters of administration with a copy of the testator's will annexed to the Administrator-General of Bengal. In June, 1904, the Administrator-General commenced an action in the High Court at Calcutta against Cowie on his administration bond and against his two sureties to the bond for the full value of the testator's estate that Cowie had received, and obtained judgment against them, and this judgment was eventually confirmed by the Privy Council: see *Debendra Nath Dutt* v. *Administrator-General of Bengal* (1); but the amount the Administrator-General recovered under the judgment was not sufficient to pay his costs of the litigation.

In the meantime the plaintiffs had commenced the present action against Thomas, who happened to be in England, and by their writ of summons claimed a declaration that they were the true owners of and entitled to recover from Thomas the twenty-eight shares then standing and registered in his name in the books of the Bank of Bengal, and consequential relief. In June, 1908, the plaintiffs obtained from Neville J. an order giving them leave to amend their writ by adding the Administrator-General of Bengal and the Bank of Bengal as defendants to the action, with leave to serve the writ as amended on the Bank of Bengal in India. The bank objected to be made parties to the action, and on November 6, 1908, the Court of Appeal, on the appeal of the bank, discharged the order of Neville J. so far as it concerned the bank.

The plaintiffs by their statement of claim alleged that the letters of administration granted to the Administrator-General were held by him for their use and benefit; that Cowie, having fraudulently procured the grant of letters of administration to himself, wrongfully and without any lawful authority or legal effect as against the plaintiffs proceeded to sell and transfer to different purchasers the testator's 86½ shares in the Bank of Bengal; and they submitted that the letters of administration granted to Cowie were void ab initio and for all purposes and did not enable him to confer any title to the shares on the defendant Thomas or any other person as against the plaintiffs. The defendant Thomas by his defence alleged that if the letters of

(1) (1908) L. R. 35 Ind. Ap. 109.

administration granted to Cowie were obtained by fraud the same was induced and made possible by the gross and culpable negligence of the plaintiffs in taking no steps to obtain administration of and to collect the testator's assets in India; that the High Court at Calcutta had full and exclusive jurisdiction to grant letters of administration to the testator's assets in India, and that Cowie in selling him (Thomas) the twenty-eight shares was not acting without any lawful authority or legal effect; and he relied on the fact that he was a purchaser for value without notice, and submitted that the grant of letters of administration to Cowie was not according to the law of British India or at all void ab initio, but voidable only, and until avoided enabled Cowie to confer on him or any other bona fide purchaser without notice a good title to the shares. The defendant Thomas further set up that the plaintiffs, having through the Administrator-General as their agent elected to affirm the said sale to him (Thomas) and having recovered judgment against Cowie and his sureties in the said action in the High Court of Calcutta, were not entitled to the relief claimed against him (Thomas) in the present action.

The question at issue turned mainly on the provisions of the Indian Succession Act, 1865, which codifies the law as to testate and intestate succession in British India in the case of Europeans, and of which the material sections are as follows:

"2. Except as provided by this Act or by any other law for the time being in force, the rules herein contained shall constitute the law of British India applicable to all cases of intestate or testamentary succession.

"3. In this Act, unless there be something repugnant in the subject or context,—

. . . . .

'Probate' means the copy of a will certified under the seal of a Court of competent jurisdiction, with a grant of administration to the estate of the testator.

'Executor' means a person to whom the execution of the last will of a deceased person is, by the testator's appointment, confided.

'Administrator' means a person appointed by competent

NEVILLE J.
1909
CRASTER
v.
THOMAS.

authority to administer the estate of a deceased person when there is no executor.

. . . . . .

"5. . . . . Succession to the moveable property of a person deceased is regulated by the law of the country in which he had his domicile at the time of his death."

"179. The executor or administrator, as the case may be, of a deceased person is his legal personal representative for all purposes, and all the property of the deceased person vests in him as such.

"180. When a will has been proved and deposited in a Court of competent jurisdiction situate beyond the limits of the province, whether in the British dominions or in a foreign country, and a properly authenticated copy of the will is produced, letters of administration may be granted with a copy of such copy annexed."

"187. No right as executor or legatee can be established in any Court of justice, unless a Court of competent jurisdiction within the province shall have granted probate of the will under which the right is claimed, or shall have granted letters of administration under the 180th section.

"188. Probate of a will when granted establishes the will from the death of a testator, and renders valid all intermediate acts of the executor as such."

"190. No right to any part of the property of a person who has died intestate can be established in any Court of justice, unless letters of administration have first been granted by a Court of competent jurisdiction.

"191. Letters of administration entitle the administrator to all rights belonging to the intestate as effectually as if the administration had been granted at the moment of his death."

"234. The grant of probate or letters of administration may be revoked or annulled for just cause.

"*Explanation.*—Just cause is—

1st, that the proceedings to obtain the grant were defective in substance;

2nd, that the grant was obtained fraudulently by making a

false suggestion, or by concealing from the Court something material to the case;

3rd, that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant, though such allegation was made in ignorance or inadvertently;

4th, that the grant has become useless and inoperative through circumstances;

5th, that the person to whom the grant was made has wilfully and without reasonable cause omitted to exhibit an inventory or account in accordance with the provisions of Part XXXIV. of this Act or has exhibited under that part an inventory or account which is untrue in a material respect." (1)

"242. Probate or letters of administration shall have effect over all the property and estate, moveable and immoveable, of the deceased, throughout the province in which the same is or are granted, and shall be conclusive as to the representative title against all debtors of the deceased and all persons holding property which belongs to him, and shall afford full indemnity to all debtors paying their debts, and all persons delivering up such property to the person to whom such probate or letters of administration shall have been granted:

. . . . .

"243. The application for probate or letters of administration, if made and verified in the manner hereinafter mentioned, shall be conclusive for the purpose of authorizing the grant of probate or administration; and no such grant shall be impeached by reason that the testator or intestate had no fixed place of abode or no property within the district at the time of his death, unless by a proceeding to revoke the grant if obtained by a fraud upon the Court."

Sects. 244 and 246 provide for the manner in which petitions for probate or for letters of administration are to be made.

Sect. 256 provides that every person to whom any grant of letters of administration is committed shall give a bond with

(1) This fifth clause was added by the Indian Succession Law Amendment Act, 1889 (VI. of 1889), s. 2.

NEVILLE J. 1909 CRASTER v. THOMAS,

one or more sureties engaging for the due collection, getting in, and administering the estate of the deceased.

"260. After any grant of probate or letters of administration, no other than the person to whom the same shall have been granted shall have power to sue or prosecute any suit, or otherwise act as representative of the deceased throughout the province in which the same may have been granted, until such probate or letters of administration shall have been recalled or revoked."

"262. Where any probate is or letters of administration are revoked, all payments bona fide made to any executor or administrator under such probate or administration before the revocation thereof shall, notwithstanding such revocation, be a legal discharge to the person making the same; and the executor or administrator who shall have acted under any such revoked probate or administration may retain and reimburse himself in respect of any payments made by him which the person to whom probate or letters of administration shall be afterwards granted might have lawfully made."

"269. An executor or administrator has power to dispose of the property of the deceased, either wholly or in part, in such manner as he may think fit."

"278. The executor or administrator shall collect, with reasonable diligence, the property of the deceased and the debts that were due to him at the time of his death."

Expert evidence as to the law of British India was adduced by both sides. Sir Horatio Sheppard, a retired judge of the High Court at Madras, and Mr. Arthur Dunne, of the Calcutta Bar, called on behalf of the plaintiffs, stated that in their view the letters of administration granted to Cowie were void ab initio. On the other hand Mr. L. De Gruyther, K.C., practising before the Privy Council, and called on behalf of the defendant Thomas, stated that in his view the letters of administration granted to Cowie were not void ab initio, but voidable, that the revocation operated only from the date of the order of revocation, and that the acts done by Cowie whilst administrator and in a due course of administration were valid. In the course of the examination and cross-examination of the expert witnesses

reference was made to the above provisions of the Code and to the following Acts and cases:—The Probate Act, 1857 (20 & 21 Vict. c. 77), ss. 46, 47, 75—78; the Indian Probate and Administration Act, 1881 (applicable to Hindus and Muhammadans), which incorporates many of the provisions of the Code; the Indian Evidence Act, 1872, s. 41; the Presidency Bank Act, 1876, s. 23; *Ellis* v. *Ellis* (1); *Abram* v. *Cunningham* (2); *Boxall* v. *Boxall* (3); *Pundit Prayrag Rag* v. *Goukaram Pershad Tewari* (4); *Gopal Dass Agrawallah* v. *Budree Dass Sureka* (5); *Komollochun Dutt* v. *Nilruttun Mundle* (6); *Shaik Moosá* v. *Shaik Essá* (7); *Mathurádás Lowji* v. *Goculdás Mádhowji* (8); and to the record in the Privy Council in *Debendra Nath Dutt* v. *Administrator-General of Bengal*. (9)

Jenkins, *K.C.*, and *Sargant*, for the plaintiffs. By English law, where there is an executor appointed, a grant of letters of administration, whether made by fraud or mistake, is void ab initio except so far as protection is given to debtors and others paying money to the estate by statute or otherwise, but this protection does not extend to any one receiving anything from the estate. On the true construction of the Code, the law of India is the same, and the principle of *Ellis* v. *Ellis* (1) and *Abram* v. *Cunningham* (2) applies. Lord Macnaghten, in the course of his judgment in *Debendra Nath Dutt* v. *Administrator-General of Bengal* (9), says: "So long as the letters of administration granted to Cowie remained unrevoked, Cowie, although a rogue and an impostor, was to all intents and purposes administrator." The defendant will no doubt rely on that observation, but it was an obiter dictum not necessary for the decision of that case, and Lord Macnaghten's mind was not directed to the point now before the Court. We submit that the Indian Court had no jurisdiction to grant letters of administration as on an intestacy when there was an existing will with

(1) [1905] 1 Ch. 613.
(2) (1677) 2 Lev. 182.
(3) (1884) 27 Ch. D. 220.
(4) (1881) Calc. W. N., Vol. VI., p. 787.
(5) (1906) I. L. R. 33 Calc. 657, 664.
(6) (1878) I. L. R. 4 Calc. 360.
(7) (1884) I. L. R. 8 Bom. 241.
(8) (1886) I. L. R. 10 Bom. 468.
(9) L. R. 35 Ind. Ap. 109, 117.

NEVILLE J. 1909 CRASTER v. THOMAS.

executors, and that under the circumstances the grant of administration did not divest the property of the executors in the shares. Lastly, there can be no ratification of a fraud of this character: *Brook* v. *Hook* (1); *Keighley, Maxsted & Co.* v. *Durant.* (2)

J. H. Ryan, for the Administrator-General of Bengal, supported the plaintiffs' contention.

Danckwerts, K.C., and *Sheldon*, for the defendant Thomas. The Indian Succession Act, 1865, is a complete code of the law of succession for Europeans in India, and the executors never were in a position to represent the testator in India. The only two persons who represented him in India were Cowie and the defendant Administrator-General of Bengal, and the only person now competent to deal with the testator's estate in India is the Administrator-General, and he has never had a power of attorney from the plaintiffs. We rely on the judgment of Lord Macnaghten in *Debendra Nath Dutt* v. *Administrator-General of Bengal* (3), which shews that Cowie was administrator and, as such, misappropriated the testator's estate. There was no maladministration by Cowie in getting the shares transferred into his name and selling them as administrator. Thomas bought them in the open market through brokers in the usual way, and if he had not completed the purchase he would have had no defence to an action by Cowie, as administrator, for specific performance: *Allen* v. *Dundas.* (4) It was the proceeds of the shares which Cowie misapplied, and for that Thomas is not liable. He therefore has a good title to the shares. Further, the Administrator-General by suing Cowie and his sureties for the proceeds of the shares has affirmed the sale, and is not, nor are the plaintiffs, now entitled to recover the shares from Thomas: *Brewer* v. *Sparrow.* (5) The parties to suffer for the fraud of Cowie are the plaintiffs, who have been negligent in their duties as executors. *Ellis* v. *Ellis* (6) and the other English decisions cited have no bearing on the provisions of the Indian Succession Act, and s. 262 of that Act protects the payment made by Thomas to Cowie as

(1) (1871) L. R. 6 Ex. 89.
(2) [1901] A. C. 240.
(3) L. R. 35 Ind. Ap. 109, 117.
(4) (1789) 3 T. R. 125.
(5) (1827) 7 B. & C. 310.
(6) [1905] 1 Ch. 613.

administrator. Moreover, the judgment of Warrington J. in *Ellis* v. *Ellis* (1) is based on *Abram* v. *Cunningham* (2) and *Graysbrook* v. *Fox* (3), but his attention was not called to the observations of Lord Redesdale on those cases in *Doyle* v. *Blake* (4), which, we submit, support our contention.

[They were stopped.]

NEVILLE J. The question I have to decide is simply as to what is the meaning of the Indian Succession Act of 1865. In the first place I think that expert evidence is admissible as to the meaning of the Act, inasmuch as it is a part of foreign law and not the law administered by this Court. On the other hand it appears to me that it is a case in which there is a conflict of testimony between the expert witnesses called, and I think that, where there is such a conflict, the judge must construe the statute and in the light of the evidence given by the expert witnesses come to the best conclusion he can as to what the law upon the matter is. The facts of the case are shortly these. A certain testator, who had been a member of the Indian Civil Service, but who had retired and lived in the United Kingdom, had money invested in certain shares of the Bank of Bengal; his own executors in the United Kingdom failed to find any trace of the existence of this property, and for some years no notice was taken of its existence. The result of that was to give an opportunity to Cowie, who was a solicitor in India, to perpetrate a very gross fraud with the assistance of one Smalley. By means of a forged power of attorney which suppressed the existence of the will he obtained an order for the grant of letters of administration to himself as attorney for a fictitious person represented by him to be the only son and sole next of kin of the testator, who had, as he pretended, died intestate. The letters of administration were accordingly granted to Cowie as the attorney of the next of kin. Under these letters of administration I think Cowie had undoubtedly, under the Act of 1865, power to realize the property of the deceased in India, including these bank shares. The bank shares were transferred into the name of Cowie,

(1) [1905] 1 Ch. 613.
(2) 2 Lev. 182.
(3) (1564) 1 Plowd. 275.
(4) (1804) 2 Sch. & Lef. 231, 237.

NEVILLE J. 1909 CRASTER v. THOMAS.

who sold them, and ultimately, upon the purchase of twenty-eight of the shares in the open market by the defendant Thomas, they were transferred to him by Cowie. So far, of course, there would be no question in the matter, but the fraud was discovered ultimately, and then it was found that there had been a will executed by the deceased, that he had appointed executors under the will, and that the letters of administration had been obtained by a very gross fraud. The letters were consequently revoked, and the question which now arises is this: Is the present representative of the estate in India entitled to the shares as against the purchaser, the present defendant Thomas, on the ground that the title remained in the executors of the deceased and did not pass to the purchaser at all?

Now, looking at the Act itself, I should feel no doubt that the evidence of Mr. De Gruyther was correct, and that the revocation made under s. 234 of the Act was a revocation which did not operate ab initio, making the whole appointment void, but operated only from the date of the order of revocation. I say that for this reason, that a revocation under s. 234 may be granted on various grounds, one of them (as shewn by clause 5, which has been added to s. 234 by s. 2 of the Indian Succession Law Amendment Act, 1889) being "that the person to whom the grant was made has wilfully and without reasonable cause omitted to exhibit an inventory or account in accordance with the provisions of this Act." It seems to me inconceivable that such an omission should invalidate ab initio the grant of letters of administration, and I can find no distinction made in s. 234 between the different grounds upon which revocation of letters of administration could be granted. Therefore I should not feel any difficulty in coming to a conclusion upon the construction of the Act, having regard to the evidence of the expert witnesses, were it not that the case of *Ellis* v. *Ellis* (1), decided in the English Courts, was cited before the Indian Courts, and apparently accepted by them as an authority, and ultimately cited, although not remarked upon, in the case before the Privy Council. I must say it appears to me that the construction of an Act of this kind cannot depend upon decisions

(1) [1905] 1 Ch. 613.

which are not decisions under the Act, and I should have thought that really little was gained by the consideration of the decision in *Ellis* v. *Ellis* (1), but inasmuch as other judges, who have had it before them, have considered it a matter to be taken into consideration, I think I must deal with it. There is one point upon which it seems to me that *Ellis* v. *Ellis* (1) is clearly distinguishable from the present case. *Ellis* v. *Ellis* (1) is founded upon an earlier decision in which it was held that letters of administration granted by the Ordinary in cases where there was a will and executors had been appointed were void ab initio inasmuch as the Ordinary had no jurisdiction to grant them at all, and the necessary result of that was, until the English Probate Act of 1857 at all events, that all the transactions entered into by the person who purported to be the administrator were void; but then a certain equity was introduced, in the nature of the equity of subrogation, whereby in cases where payments were made to what I will call the false administrator, and applied by him in a due course of administration, the debtors who made those payments were absolved by the payments to the administrator. That, I think, is an equity with which we have not to deal here, and the first question that arises is, were the circumstances under which *Ellis* v. *Ellis* (1) and the cases upon which it was decided the same as in the present case? It appears to me they were not, and for this reason, that in the present case there were no executors in India, and the proper course for the Indian Court to have taken, had it known the circumstances, would have been to appoint an administrator with a copy of the will annexed. That, nevertheless, would have been a grant of letters of administration, and the result of that grant would have been to vest in the administrator the estate in India with the powers which are provided in the Act. In that case he would have taken his estate not by virtue of the will, but by virtue of the grant by the Court, and that seems to me to shew that the position in the two cases is not similar, inasmuch as here the title of the administrator must necessarily emanate from the Court itself, and is not a title derived from the will as in the case of *Ellis* v. *Ellis* (1) and the

(1) [1905] 1 Ch. 613.

NEVILLE J. 1909 CRASTER v. THOMAS.

earlier cases. The case in the Indian Courts of *Gopal Dass Agrawallah* v. *Budree Dass Sureka* (1) throws a little light upon it. There the learned judge held that where no executor had been appointed by the will the principle of *Ellis* v. *Ellis* (2) did not apply, inasmuch as there were no executors and administration had to be granted. That seems to me very similar to the present case, because here I think administration had to be granted, and there were no executors who had authority in India or in whom the Indian property vested. It seems to me, therefore, on that ground that *Ellis* v. *Ellis* (2) is not a decision, even if it ought to be regarded, which governs the present case. As I said before, on the construction of the Act it seems to me that the revocation is a revocation which does not apply ab initio, but which applies from the date of the revocation. There is another point which I think has to be considered, and that is this. Sect. 262 of the Act validates all payments bona fide made to the administrator or executor, as the case may be, under the Act, and I am inclined to think that that section alone might cover the present case, the Indian property not being, as it appears to me, vested in the executor, and this section validating all payments made to the administrator. This payment was a payment made to the administrator, and although, if the property in the shares had vested in the English executor, there might have been a difficulty as to the purchaser getting the property, still, if the payment was good, it seems to me that the estate, or whoever represented the estate, would be a trustee of the property in the shares for the purchaser. That is an independent ground upon which it seems to me that one arrives at the same result, having regard to the construction of the Act. Then, finally, I think the judgment of Lord Macnaghten (3), in which he expresses the opinion of the Privy Council, is inconsistent with the view that the grant of the letters of administration was void ab initio, and that the intermediate transactions between the date of the grant and the revocation were of no validity. On all these grounds, therefore, I come to the conclusion that the transaction by which the shares were sold was, under the Act of 1865, a valid

(1) I. L. R. 33 Calc. 657, 664. (2) [1905] 1 Ch. 613.
(3) L. R. 35 Ind. Ap. 109, 117.

transaction, and that the present administrator has no claim against the purchaser. The result is that the action must be dismissed with costs.

Solicitors for plaintiffs and defendant the Administrator-General of Bengal: *Oliver & Lyall.*

Solicitors for defendant Thomas: *Sanderson, Adkin, Lee & Eddis.*

H. L. F.

REYNOLDS *v.* BARNES.

[1908 R. 1494.]

Inclosure Act—Repair of Private or Occupation Roads—Dedication as Highway —Highway Act, 1835 (5 & 6 *Will.* 4, *c.* 50), *s.* 23—*Inclosure Act*, 1845 (8 & 9 *Vict. c.* 118), *s.* 68.

A valuer who makes an award under the Inclosure Act, 1845, has a discretion in each case as to the amount of formation and completion of private or occupation roads and ways set out by him in his award. The liability under s. 68 of the Act to maintain and keep repaired the private or occupation roads and ways arises after they have been formed and completed and is confined to the extent to which they have been formed and made up.

The valuer may, where it is necessary, set out footways to accommodate inclosed lands or adjoining owners.

Observations as to the effect of s. 23 of the Highway Act, 1835, with reference to private or occupation roads or ways set out under the Inclosure Act, 1845.

In this action the plaintiff claimed a declaration that the defendant, as the owner of allotment No. 79 in the inclosure award referred to below, was liable to repair and maintain a road known as Brindle Lane, situate at Forty Green, in the parish of Penn, Bucks. He also claimed a mandatory injunction to compel the defendant to repair the road, or, in the alternative, damages for the non-repair. The defendant denied his liability and set up the defence that the road was a highway and repairable by the inhabitants at large.

The road was set out in 1855 by a valuer acting under the

PARKER J. 1909 REYNOLDS v. BARNES.

Inclosure Act, 1845, the material sections of which are ss. 62, 65, 67, 68, 104, and 105. (1)

By his award, dated August 20, 1855, and confirmed on August 23, 1855, No. 19, a private carriage way and occupation road, 20 feet wide, and numbered 19 on a map annexed, was set out for the use of the persons for the time being interested in certain old inclosures and the allotments numbered 79 to 82 on the map, and was for ever thereafter to be maintained and repaired by the owner and proprietor of the allotment numbered 79.

At the time of the action the plaintiff was the owner of plot 82 and the defendant was the owner of plot 79. The road had been set out and formed by the valuer, but had never been formally

(1) 8 & 9 Vict. c. 118 :—

Sect. 62: "In the first place the valuer acting in the matter of any inclosure shall and may, before he shall proceed to make any of the divisions and allotments of the lands to be inclosed . . . . set out and make public roads and ways, and widen public roads and ways, in or over the land to be inclosed . . . ."

Sect. 65: ". . . . The valuer shall form and complete such parts of the said public roads and ways as shall be newly made; and every such public road and way to be set out and made under this Act shall be of the width required by the" Highway Act, 1835 (see s. 80), "for a road or way of the like description, which may be dedicated to the use of the public."

Sect. 67: "When and so soon as two or more of Her Majesty's justices of the peace . . . . shall certify any of the public roads and ways to be set out . . . . on any inclosure to be sufficiently formed and completed, such roads shall thenceforth be kept in repair by such persons and in such manner as the public roads within the said parish are or ought by law to be kept in repair . . . ."

Sect. 68 is set out at length in his Lordship's judgment.

Sect. 104: ". . . . The valuer, under the direction of the commissioners, shall cause to be drawn up and engrossed on parchment the award in the matter of such inclosure, which shall be signed by the valuer . . . . and shall contain or set forth the report of the valuer . . . . and the valuer shall annex to such engrossment the map referred to by such report; and the commissioners shall confirm such award, with the date of such confirmation thereunto annexed, under their hands and seals."

Sect. 105: "Such confirmation as aforesaid shall be conclusive evidence that all the directions of this Act in relation to such award, and to every . . . . matter therein set forth and contained, which ought to have been obeyed and performed previously to such confirmation, shall have been obeyed and performed . . . . and every direction, matter, and thing specified and set forth in such award as aforesaid shall be binding and conclusive on all persons whomsoever."

dedicated to the public as a highway, and was in want of repair. The facts relating to the setting out and making of the road and its subsequent history are stated in his Lordship's judgment.

Romer, K.C., and *E. P. Hewitt*, for the plaintiff. The plaintiff only wants a declaration that the defendant is liable to repair the road, and he is entitled to that. The valuer's award fixes the defendant with the liability. There is sufficient evidence to enable the Court to infer that the materials shewn to form the road were placed where they are when it was made. A road set out as this has been, and directed by the award to be repairable as this road is, may be a highway which is repairable by the inhabitants at large: *Reg.* v. *Inhabitants of Bradfield* (1); but there is no evidence that the road in this case has been used as a highway, except by foot passengers. As the road was made after the passing of the Highway Act, 1835, the obligation on the inhabitants to repair could not be imposed without following the procedure pointed out by s. 35 of that Act.

Martelli, K.C., and *Luxmoore*, for the defendant. A distinction between the costs of setting out and forming a way and those of completing it is drawn by s. 68 of the Inclosure Act, 1845, and under that section the liability to repair only arises after the formation and completion of the road; but the evidence points to the fact that the road has never been formed or completed. The effect of s. 105 is not to make the award conclusive in every case: *Jacomb* v. *Turner*. (2) The road is a highway, and the liability to repair it is on the inhabitants at large. Sect. 23 of the Highway Act, 1835, has no application to cart or carriage ways or footways set out under the Inclosure Act, 1845: Pratt and Mackenzie on Highways, 15th ed. p. 168, note (*c*). The liability to repair is on the parish unless it can shew that some particular person is liable, just as the county was in the case of a bridge: *Reg.* v. *Inhabitants of Wilts*. (3) The onus is not on the defendant to shew that the inhabitants are liable to repair; and if he is under any liability, it is not greater than theirs, which is only to keep in repair as a footway. A mandatory

(1) (1874) L. R. 9 Q. B. 552.
(2) [1892] 1 Q. B. 47.
(3) (1704) 1 Salk. 359.

PARKER J. 1909 REYNOLDS v. BARNES.

order to repair will not be made: *Attorney-General* v. *Staffordshire County Council.* (1) Where no legal right has been infringed the plaintiff is not entitled to a declaration by the judgment: *North Eastern Marine Engineering Co.* v. *Leeds Forge Co.* (2); *Offin* v. *Rochford Rural Council.* (3)

Romer, K.C., in reply.

PARKER J., after stating the nature of the plaintiff's claim and expressing his regret that such large costs should have been incurred in respect of a matter of no great pecuniary importance, continued as follows:—When the question whether the defendant was or was not under statutory liability to repair this road was first mooted he met the case by a denial of liability, and inasmuch as this question may be of some importance, not only to the plaintiff, but also to other people for whose convenience the liability was imposed by the statute, and had to be somehow decided in default of some amicable arrangement, I will deal with the matter strictly as a point of law upon the facts which have been proved.

The first question which I have to consider is one of the construction of the Inclosure Act, 1845, under which the liability arises. The procedure under that Act is for a valuer to be appointed by commissioners, whose duty it is to make a scheme for the inclosure of lands to be inclosed under the Act, and in making that scheme the valuer is at liberty to do various things, including the setting out of both public and private ways. The group of sections dealing with the subject includes ss. 65, 66, 67, and 68 of the Act. A difference is made with regard to public roads and private roads. When the valuer sets out public roads—the expression is "public roads or ways"—he is required, before they are taken over, as it is contemplated they will be taken over, by the local authorities for all purposes of repair, to form and make them up to some extent at any rate; and before the liability of the public authority arises there must be a certificate of the justices that the roads in question have been sufficiently formed and

(1) [1905] 1 Ch. 336. (2) [1906] 1 Ch. 324.
(3) [1906] 1 Ch. 342.

completed. That certificate is filed as of record, and from the moment it is filed the liability of the inhabitants, or the local authorities, or whoever it may be is responsible for the repair of the roads, arises. Then s. 68 deals with the question of private roads, and it is in these words: "The valuer acting in the matter of any inclosure shall and may set out such private or occupation roads and ways"—I take it that that includes not only roads for the purposes of the passage of carriages and carts, but also footways if it be necessary to set out footways for the accommodation of any of the lands to be inclosed, or any of the adjoining landowners who are interested in those lands—"through the lands to be inclosed as he shall think requisite, for the use of the persons interested in such lands or any of them; and any expenses which the valuer may incur relative to the setting out or formation or completion of such private roads and ways, or any of them, shall, unless the valuer shall otherwise direct, be paid in the same manner as the other expenses of the inclosure; and such expenses of the formation and completion of such private roads and ways as the valuer shall direct shall be borne by, and after the formation and completion of such private roads and ways the same shall be maintained and kept in repair by and at the expense of the owners and proprietors for the time being of the land inclosed, or such of them, and in such shares and proportions and in such manner as the valuer shall direct; and after such private roads and ways shall have been set out and made the grass and herbage arising thereon shall for ever belong to and be for the use of such persons interested in the lands to be inclosed as the valuer shall direct, and in the absence of such direction shall belong to the proprietors of the land to be inclosed which shall next adjoin the said roads and ways on either side thereof as far as the crown of the road; and after such setting out as aforesaid all private or occupation roads or ways over, through, and upon the lands to be inclosed which shall not be set out as aforesaid shall be for ever stopped up and extinguished." The section undoubtedly contemplates that when the valuer sets out a private road or private way under the powers of the Act he will do something which is in the Act referred to as formation and completion; and it also appears

PARKER J. 1909 REYNOLDS v. BARNES.

from the latter part of the section that provision is made for the case of herbage up to the crown of the road from each side, which appears to me to point to the fact that the Act contemplates that some of the roads which may be laid out and formed and made under this Act will be covered with grass for their whole extent. It appears to me, therefore, that the amount involved in the formation and completion is necessarily to a large extent at the discretion of the valuer who sets out the road and must depend upon the particular circumstances of the case. If, for example, a footpath is being set out, it would be absurd to suppose the valuer would value the footpath in the same way as the ordinary roads in parishes which are made under circumstances requiring them to be metalled. At the same time a good deal may be necessary in the way of formation, and it may involve alteration of levels and cuttings, and otherwise. It appears to me, therefore, that what is involved in formation and completion depends on the circumstances of the case and the discretion which the valuer under the Act may exercise in each individual case.

In the present case, the valuer in the award sets out a road which he calls No. 19 in these words: "No. 19. One other private carriage and occupation road of the width of 20 feet and numbered 19 on the said map A, situate at Forty Green, commencing at a lane called Brindle Lane and extending thence round the said green on the north and east sides to and terminating at a public-house called the 'Ship,' which said road is set out for the use of the persons interested for the time being in the old inclosures joining the said road as well as the allotments numbered 79, 80, 81 and 82 on the same map. And I direct and appoint that the said private carriage and occupation road shall for ever hereafter be maintained and repaired by the owner and proprietor of the allotment numbered 79 on the said map A."

There is no doubt that the plaintiff in this case is the owner of plot 82, which is one of the plots for the accommodation of which this road is set out, and there is no doubt that the defendant is the owner of plot 79, upon the owner of which the liability to repair the road was imposed. It has been suggested that he is not the owner of the whole of plot 79, and by a

comparison of plans it seems to me that there is possibly a small piece in one corner which belongs now to the owner of another plot, and not to the owner of 79, but it is so small that Mr. Martelli, exercising, I think, a sound discretion, has elected not to raise any point upon that, so that I may treat the defendant as the owner of the whole of plot 79.

The road in question is said to be now in a very bad state of repair, and it is contended that the defendant ought to make it up by reason of the statutory liability. It appears to me that, on the true construction of the Act, the liability of the defendant as the owner of plot 79 to keep this road in repair is limited by the extent to which that road was formed and made up at the time of the award and prior to the liability being imposed upon him. It is a liability which arises after the formation and completion of the road, and I think the liability to repair that road when formed and completed must be limited by the nature of the formation and completion ; and, therefore, it becomes necessary to consider what was done in 1854 or 1855, when this road was set out, formed, and completed, if it ever was set out, formed, and completed, in order to ascertain the extent of the present liability resting on the defendant.

Of course it is difficult at this distance of time to arrive exactly at what was done so many years ago, but it appears to me to be reasonably certain that the valuer proceeded in this way. He entered into a contract for the formation and completion of this road. The contractor employed a foreman, and, under the foreman, workmen, and commenced by marking out the road in the usual way by cutting nicks in the turf of the common over which the road was to pass, apparently on both sides of the road, leaving a few feet outside what was intended to be the roadway, presumably for the purpose of the passage of people on foot. Having done that, he proceeded to level the roadway throughout, and, in the words of the eye witnesses, he proceeded to do the levelling by cutting off the lumps, or, as one of them said, the hills, and filling up the low places, or, as I think another of the witnesses said, the hollows. There is no doubt, therefore, that a considerable amount of levelling work was done ; and one of the eye witnesses said that what was done extended the whole length of the road

PARKER J. 1909 REYNOLDS v. BARNES.

set out by the award, and was not confined to any particular places. Except for what I have mentioned, the witnesses say that practically nothing was done. On the other hand, the road has been examined now by professional gentlemen with a view of seeing and ascertaining what was its original nature. They have made tests in various parts of the road throughout its entire length by cutting test holes, and apparently in a great many of those test holes—at any rate in as many as four or five out of perhaps eight or ten which were cut at various points—they have discovered that material has at one time or another been placed on the road, consisting of gravel or flints, and in one case, I think, chalk, which material is foreign to the soil in its natural state, the soil consisting of loam over sand, and which material could apparently only have come there by human agency at some time or other. Of course it is consistent with the evidence that the road has been repaired by the gravel or flints or chalk having been placed on it at some time subsequent to the award; but it is also consistent with the original formation and completion of the road having involved the placing of this metal upon the surface or some parts of it. One of the surveyors called has formed the opinion that throughout the road was metalled slightly, but not to any great extent, in that way. Another has formed the opinion that it was not metalled throughout in that way, but that it was metalled where it required metalling from place to place. It appears to me that, there being no evidence at all that any repair has ever been done to this road,—all the witnesses appear to be agreed upon that,—the more rational inference is that the original formation of the road did involve metalling in certain places, probably by placing on the damp places a certain amount of road material in the way of gravel or flints, or, in one place, chalk. I conclude, therefore, as a question of fact, that in making up the road the valuer did to a certain extent, though not necessarily throughout, after levelling, put on a certain amount of metal. He may have filled up the damp places and the holes with metal, and not with turf which he removed from the high places. Beyond that, I do not think he could have carried out the formation and completion of the road, but I do think that what he did was a formation and completion

within the meaning of the Act, and that the Act throws upon the owner for the time being of plot 79 a liability to put the road from time to time in as good a condition with regard to levels and surface as it was left in by the valuer prior to the award, after laying out, forming, and completing the road.

Now let us pass for one moment to the present condition of things. All the witnesses, I think, agree that this road is in a very unsatisfactory state, and that, at any rate in wet weather, parts of it are little better than a quagmire; that after wet weather no one can walk along it without sinking in over his boots, at any rate in a good many places; and that there are holes in it which get filled up with water and mud, and over which the foot passenger has to jump if he wishes to pass along the length of the road scathless. There is also evidence—and I think most of the witnesses agree—that in wet weather, at any rate, it is very difficult if not impossible for carts to get through in parts. It is said that carts have got through even in wet weather. That may be so, but even though carts can pass along a road, that does not prove that the road is passable for carts in the ordinary common-sense meaning of the word. Even one of the defendant's witnesses said that tradesmen's carts were deterred from using the road because in wet weather there would be considerable danger of the springs snapping. I gather, therefore, that even in dry weather, having regard to these holes, it must be no very pleasant thing to use the road. The levels, in fact, which originally existed after the award require to be readjusted; the holes require to be filled up, and something requires to be done to the surface to enable the road to be used for those purposes for which it was laid out, and in as convenient a manner as it was when the liability of the defendant's predecessor to repair arose.

It appears to me, therefore, that the plaintiff has proved that the road is in disrepair, and that a liability was imposed upon the defendant's predecessor, which the defendant has taken over with his land, to keep the road in repair. It also appears to me to be obvious that, looking at the plot owned by the plaintiff and considering the circumstances which exist, the plaintiff's interest in the land is of less value to him than it would be if the road had

PARKER J. 1909 REYNOLDS v. BARNES.

been kept up to its proper state of repair. I do not say that the damage he has suffered is very great, as I gather the whole value of his plot is under 100*l.*; but still there is a certain amount of deterioration to that value arising by the road being in the state in which it is.

Now, having found a liability on the part of the defendant, and having found damage suffered on the part of the plaintiff, it remains to consider the other point—for only one other really substantial point was raised in the defence, namely, whether this road has become a public road. The circumstances with regard to this are rather curious, for it appears that where this road bends round from having originally run north and south, so as to run east and west, there are two footpaths which debouch upon it, and, prior to the award, persons using these footpaths—which are undoubtedly, as far as the evidence goes, public footpaths—used to cross the common, probably going in any direction they chose. That they can no longer do because of the inclosure of the common, and persons using these footpaths now use the road, either as far as it runs north and south or as far as it runs east and west, in each case coming out into the high road which adjoins plot 79. It appears to me, therefore, that probably there is a public right of way over one or other of the branches of this road—possibly and indeed probably over both. I am told that the award has been examined and that no such way was laid out in the award. How that may be, and what the effect of that may be, I do not know. The Act appears to say that it extinguishes all roads which are not laid out over the common land to be inclosed. If that is the case, a circumstance might have arisen which at that time might have caused considerable difficulty. I think there is no doubt that the public have ever since passed over one of these paths, and probably, almost certainly, there is a public right of way, but for foot passengers only. I do not consider that the fact that the public have acquired a right of way for foot passengers over these two branches of the road in question really affects in any manner the liability of the defendant to repair. Even if the road had been dedicated prior to the Highway Act, 1835, I doubt whether that would have affected his liability; at any rate it would not have affected his liability

so far as he was under liability to make up the road sufficiently for the purpose of the passage of carts and carriages. The liability of the local authority would be confined to keeping it up so far only as it was proper for the purposes of the passage of foot passengers; but then we have to consider, having regard to the fact that if there has been a dedication at all it has been dedicated since the passing of the Highway Act, what is the effect of s. 23 of that Act, and it appears to me that that section really excludes the liability of the local authority. Sect. 23 of that Act provides that "no road or occupation way made or hereafter to be made by and at the expense of any individual or private person, body politic or corporate, nor any roads already set out or to be hereafter set out as a private driftway or horsepath in any award of commissioners under an inclosure Act, shall be deemed or taken to be a highway which the inhabitants of any parish shall be compellable or liable to repair, unless the person, body politic or corporate, proposing to dedicate such highway to the use of the public, shall give three calendar months' previous notice," and certain other conditions shall have been fulfilled. It appears to me that on the reasonable construction of that section the road in question would be included; for it is a road which has been set out under the award, and it is set out as a private road. The words of the Act are "private driftway or horsepath," but if it were necessary to decide it, I should decide that this road was a road within the meaning of that expression, and that, having regard to that, the local authority or the persons responsible for the repair of the highway would be immune from any liability which prior to the Act they would have been subject to by reason of the section. I do not think it is necessary to decide that point, because, as far at any rate as the keeping up of this road for the passage of carts is concerned, the defendant is, in my opinion, undoubtedly under liability whether it became a public highway or not. I may add that there is absolutely no evidence at all that the road in question has become a highway for any other purpose than for the purpose of foot passengers. There is no evidence at all that the public have a right to go over it with carts and carriages at their will and pleasure, though they may have a right to go over it on

PARKER J. 1909 REYNOLDS v. BARNES.

foot for the purpose of reaching each of the footpaths which come out at the bend of the road.

That, I think, really disposes of the case, for, as a matter of fact, the plaintiff does not ask for the mandatory injunction which is mentioned in the statement of claim, and, therefore, I need not consider whether it would be the practice of this Court in such circumstances to grant a mandatory injunction. What is desired is to have the right ascertained; and then the plaintiff thinks, and, I hope, thinks with reason, that matters will accommodate themselves.

I propose, therefore, to make a declaration that the owner or owners for the time being of plot 79 on the plan annexed to the award are liable to keep the road No. 19 on the plan in repair to the extent to which it was formed and made up by the valuer at the time of the award. I do not think it is necessary to go further than that in the declaration, because in my judgment I have found the facts as to the manner in which the road was then made up, and those facts can be referred to if any dispute arises. I do not propose now to direct any inquiry as to damages, but I will give liberty to apply at the expiration of, say, twelve months for an inquiry into damage, unless the road is made up in the meantime in accordance with the declaration.

With regard to the costs, this action really has been fought as a matter of right and for obtaining a declaration of legal liability, and I think the costs ought to follow the event.

Solicitors for plaintiff: *Stow, Preston & Lyttelton, for Charsley & Reynolds, Slough.*

Solicitors for defendant: *Hollams, Sons, Coward & Hawksley.*

F. E.

In re An Application by WHITFIELDS BEDSTEADS, LIMITED, FOR REGISTRATION OF A TRADE MARK.

EVE J.
1909
June 8, 9.

Trade Mark—Registration—Distinctive Mark—"Lawson Tait"—Adapted to distinguish—User—Trade Marks Act, 1905 (5 *Edw.* 7, *c.* 15), *s.* 9, *par.* (5.).

By a written agreement made in 1898 between the predecessors of the applicants and L. T., it was agreed that L. T. should permit them to manufacture and sell a certain pattern of bedstead under the name of the L. T. bedstead, on payment of a royalty. The pattern of bedstead referred to was a bedstead constructed in three parts, and had been approved by L. T. in 1881, when he gave verbal permission for the use of his name upon these bedsteads. There was evidence that since 1881 the name L. T. had been continuously applied to bedsteads constructed on the above principle by the applicants and their predecessors, and to nothing else, and that the bedsteads had become well known to the trade generally as the L. T. bedsteads. Upon an application, referred to the Court by the Board of Trade, for the registration of the words "Lawson Tait" as a trade mark in class 41 for bedsteads:—

Held, that the name "Lawson Tait" must be deemed to be a distinctive mark in respect of bedsteads of the pattern referred to in the agreement of 1898, within the meaning of s. 9, par. (5.), of the Trade Marks Act, 1905, and the registrar must be directed to proceed with the registration of it in respect of those bedsteads.

Motion.

This was an application by Messrs. Whitfields Bedsteads, Limited, of Birmingham, for the registration of the words "Lawson Tait" in class 41 for bedsteads. The applicants were the present owners of a business which had been established in Birmingham in 1849 and had been carried on continuously. The application was made under the Trade Marks Act, 1905, and had been referred to the Court by the Board of Trade under r. 39 of the Trade Marks Rules, 1906.

It was admitted that the mark was not such a mark as would fall within the description of pars. (1.), (2.), (3.), and (4.) of s. 9 of the Trade Marks Act, but it was claimed to be a distinctive mark within par. (5.) as adapted to distinguish the goods of the applicants from the goods of other persons.

In 1881 Dr. Lawson Tait, a well-known physician then practising in Birmingham, had his attention called to certain

EVE J. 1909

WHITFIELDS BEDSTEADS' APPLICATION, *In re.*

bedsteads made in three parts by S. B. Whitfield & Co., the predecessors of the present applicants, and expressed his approval of them. He also verbally authorized S. B. Whitfield & Co. to use the words "Lawson Tait" as a trade mark in connection with bedsteads manufactured by them, for the purpose of enabling them to distinguish their goods from those of other makers. The words "Lawson Tait" were immediately used for the required purpose, and, according to the evidence of Mr. Gilbert Whitfield and other trade experts, the bedsteads became known to the trade generally as the Lawson Tait bedstead. On September 29, 1898, Dr. Lawson Tait entered into a written agreement with S. B. Whitfield & Co., Limited, the successor of S. B. Whitfield & Co., by which, after reciting that S. B. Whitfield & Co., Limited, were the manufacturers of a certain pattern of bedstead known and described as the "Lawson Tait," it was agreed as follows:

"(1.) The said Lawson Tait shall permit the said S. B. Whitfield & Co., Limited, to manufacture and sell such pattern of bedstead under the name of the 'Lawson Tait bedstead,' on payment to the said Lawson Tait, his executors or administrators, of a royalty of two pence on every such bedstead sold by them from the date of this agreement.

"(2.) The said Lawson Tait shall not permit any other firm or person to mark or sell bedsteads with his name, and shall, at the expense of the said S. B. Whitfield & Co., Limited, take or join with them in taking such proceedings against any person or firm so doing as they shall think fit.

"(3.) The said S. B. Whitfield & Co., Limited, shall keep a strict and accurate account of the number of bedsteads sold by them, marked as aforesaid.

"(4.) Payment of the above-mentioned royalty shall be made quarterly."

The pattern of bedstead referred to in this agreement, to which bedstead the name Lawson Tait was applied, was one made in three parts, that is, a bedstead in which the whole centre part, or bedstead bottom, as distinct from the head and foot, was made in one piece. There was an affidavit filed by a Mr. Goold during the course of the hearing stating that the name

Lawson Tait had always been applied to three-part bedsteads constructed on the above principle, and to nothing else. Some 210,000 of these bedsteads had been sold.

The nature and result of the evidence appear from the judgment.

Sebastian, for the application. The evidence is sufficient to shew that the words "Lawson Tait" can now be deemed a "distinctive mark" within the meaning of s. 9, par. (5.), of the Trade Marks Act, 1905. If it has in fact distinguished these bedsteads from the goods of others, it must necessarily be found to be adapted to distinguish. The Court is enabled by the Act to take into consideration the extent to which the user of the mark has rendered it distinctive for the goods with respect to which it is proposed to be registered. I only seek for the registration of this mark in respect of the three-part bedsteads approved by Dr. Lawson Tait.

Sargant, for the Registrar of Trade Marks. I ask the Court not to sanction this application. The Court cannot come to the conclusion that this name of an eminent physician is a "distinctive mark." Distinctive must mean adapted to distinguish the goods of the applicants from those of others. There is no proof of the adaptability of the name for that purpose. There are various objections to the registration of these words. First, there is no patent for the bedstead, and the construction of similar bedsteads is open to the whole world, and in fact three-part bedsteads have been manufactured ever since 1881 by various other manufacturers. Secondly, a mark cannot be considered a distinctive mark merely because it has been exclusively applied for some length of time to the goods of one particular trader. Here the exclusive user down to the death of Dr. Lawson Tait is in the nature of a monopoly under the agreement of September 29, 1898, whereby Dr. Lawson Tait bound himself not to permit any other firm to use his name for bedsteads, although they might be of a similar pattern. Then, lastly, if the name of an eminent physician is found attached to a particular bedstead, the public will be led to conclude that it is of a type which has been personally approved of by the physician, and if, as appears to be

EVE J. 1909 WHITFIELDS BEDSTEADS' APPLICATION, *In re.*

the fact, this name has been also attached to bedsteads generally which Dr. Lawson Tait never saw and never approved of, the registration of this mark might lead to confusion, mistake, and possibly to fraud. This application should therefore fail.

Sebastian, in reply.

June 9. EVE J., after stating the nature of the application, continued:—I think if this were an application to register a new mark it would not be possible for any tribunal to say that the mark was a distinctive one within s. 9 of the Act of 1905. A priori, it has no connection with the applicants, with their place of business, or with their goods, and the only way in which Mr. Sebastian can put his case is this, that having regard to the sentence with which the proviso at the end of s. 9 concludes, it is in fact a distinctive mark within the meaning of par. (5.) of that section. The sentence is: "In determining whether a trade mark is so adapted,"—that is adapted to distinguish the goods of the proprietor of the trade mark from those of other persons,—"the tribunal may, in the case of a trade mark in actual use, take into consideration the extent to which such user has rendered such trade mark in fact distinctive for the goods with respect to which it is registered, or proposed to be registered." Upon the evidence, the facts seem to be as follows. Prior to the year 1881 iron bedsteads, or the majority of iron bedsteads, were constructed of several parts, and difficulty and discomfort in putting them up and taking them down were occasioned by that multiplication of parts. In or about the year 1881 the applicants and other manufacturers had begun to manufacture an iron bedstead which consisted of three parts only, a foot and head piece, and then a centre piece, rectangular in shape, with a wire mattress stretched across the rectangular piece. In 1881 bedsteads of that pattern, manufactured by the applicants, were brought to the notice of Dr. Lawson Tait, who was then in practice, and, as I read the affidavit of Mr. Gilbert Whitfield, Dr. Tait was struck not only with the form of construction by which the number of pieces was reduced to three, but also with the make of the bedsteads generally; they impressed him as being peculiarly suitable for use in hospitals, and in cases where persons

were likely to be confined to bed for considerable periods. Thereupon the applicants, or their predecessors in business—and I use the word applicants, as it has been used in these proceedings, as including the present company and their predecessors in business—suggested to Dr. Tait that he should allow them to attach his name to the bedstead of the particular pattern so made, or so intended to be made by them. He gave that consent, and from about the year 1881 onwards the applicants did attach to bedsteads of that pattern, made by themselves, the appellation of "Lawson Tait bedstead." The bedstead undoubtedly became known to the trade generally, and to persons and corporations in the habit of ordering bedsteads in bulk, as the "Lawson Tait bedstead." Dr. Lawson Tait, thinking that he should have some recognition from the applicants for the use of his name, suggested to them that they ought to pay him a small sum in the nature of a royalty for each bedstead sold to which his name was attached, and accordingly, in 1898, an agreement in writing was entered into between the applicants, by their then name, and Dr. Lawson Tait, under which a royalty of 2*d.* a bedstead was to be paid to Dr. Lawson Tait. [His Lordship read the material parts of this agreement, and continued:—]

Pursuant to that agreement and down to the date of the death of Dr. Lawson Tait in 1899 the applicants kept the accounts and paid to Dr. Lawson Tait the royalty thereby provided for; and previously to his death they entered into a supplementary agreement, under which they agreed to continue to pay a royalty of 2*d.* a bedstead to his widow after his death. She still survives, and the 2*d.* per bedstead is still being paid to her. Upon the evidence filed when this application was made, I think Mr. Sargant was justified in asking me to draw the inference that the application of the name "Lawson Tait" to bedsteads had not been confined to bedsteads of the pattern referred to in that agreement. The evidence of persons very well acquainted with this trade was certainly so framed as to give rise to the impression that bedsteads of all makes and of all descriptions manufactured by the applicants were on the market bearing the name "Lawson Tait," and that the use of the name had not been confined to the pattern of bedstead referred to in the agreement.

EVE J. 1909 WHITFIELDS BEDSTEADS' APPLICATION, *In re.*

But it occurred to me that, in drawing that inference, I might be drawing an inference which was not in accordance with the facts, and for this reason, that under the arrangement between the late Dr. Lawson Tait and the applicants the obligation is imposed upon them of paying royalty on bedsteads bearing his name; and it seemed to me to be a very strange thing, there being an agreement under which they were entitled to apply his name to a particular pattern of bedstead, and were bound to pay a royalty in respect of bedsteads to which his name was so attached, if both parties should so far have departed from the agreement as to allow the name to be attached to bedsteads of which, so far as I know, Dr. Lawson Tait had never expressed his approval, and of which, in many cases, he may have been entirely ignorant. I therefore thought it right that the matter should be cleared up, and upon the evidence as it now stands, supplemented as it has been by the affidavit of Mr. Goold, now before me, it is quite clear that the applicants have adhered to the agreement with Dr. Lawson Tait, and that the Lawson Tait bedstead, or the bedstead to which the name "Lawson Tait" is and has been uniformly applied, is a bedstead of the construction and pattern approved by the late Dr. Lawson Tait. I must, therefore, read the expert evidence of these persons engaged in the trade as evidence directed to bedsteads of that particular type, and any order which I make allowing this registration to proceed must be limited to bedsteads of that particular type.

It is said that there are three objections to the registration of this mark as a distinctive mark, and I will deal with them, not in the order in which they were put to me, but in the inverse order. Mr. Sargant said, with considerable force, that if you find attached to a particular bedstead, or type of bedstead, the name of a well-known physician, it will lead ordinary people, and the public at large, to conclude that it is a type of bedstead which has received the personal approbation of that eminent medical man; and he urged that if, in fact, this name has been attached indiscriminately to bedsteads approved of personally by Dr. Lawson Tait, and also to bedsteads which he never saw, and as to the construction of which he had no knowledge, I should be

really allowing the registration of a mark which may lead to confusion, mistake, and possibly fraud on the public. To that argument, but for the evidence which has been filed this morning, I should have felt myself bound to accede, and to refuse the registration; because undoubtedly, when you attach to an article of this description the name of a man whose approbation must carry weight with it, you do represent, and certainly must be taken as intending to represent to the public that it is an article of which that eminent person has approved; and, but for the evidence which I have had this morning, I should have been bound, in the exercise of my discretion, if, in fact, the name had been applied to bedsteads indiscriminately, to refuse to allow the registration to proceed. But, in view of the evidence which has been filed this morning, I think that argument is really met, and that, in fact, the name is and has been confined in its user to the type of bedstead of which Dr. Lawson Tait did approve. The second objection which Mr. Sargant raised on behalf of the Comptroller was of this nature. He urged that the Court ought not to treat a mark as distinctive merely because for a certain length of time it has been applied exclusively to the goods of one trader; and that argument is obviously sound, because in the case of a patent it may be that, during the currency of the patent, the article becomes known and must become known by its distinctive name as the exclusive product of the person who is entitled to the patent; and one could not, immediately after the expiration of the patent, look at the user which had grown up during the subsistence of the patent, and say that that user, in itself, had constituted the mark a distinctive mark; and, by analogy, Mr. Sargant argued here that at least down to the date of the death of Dr. Lawson Tait in 1899 the exclusive user which had grown up was in the nature of a monopoly arising under the agreement to which I have already referred, and under which Dr. Lawson Tait bound himself not to allow the user of his name for bedsteads of other makers, although of a similar pattern. There again I think there is considerable force in that argument; but I must not forget that some ten years have now expired since Dr. Lawson Tait's death, and that during the whole of that intervening period there has been in fact no attempt to

EVE J. 1909 WHITFIELDS BEDSTEADS' APPLICATION, *In re.*

prove that the name has become attached to or been used for bedsteads of a similar design manufactured by persons other than the applicants. In fact I think Mr. Sebastian is justified when he says that, on the evidence, continuously, for considerably more than a quarter of a century, this name has been and has remained attached exclusively to bedsteads of this pattern emanating from the applicants' manufactory at Birmingham.

Thirdly, Mr. Sargant raised this objection. He said this bedstead is not made under a patent; it is not a bedstead of a pattern which the applicants alone can manufacture; it is open to every bedstead manufacturer in the world to manufacture a bedstead in three parts, and it is quite clear from the evidence that such a bedstead was manufactured as early as 1881 by other manufacturers, and has continued to be manufactured ever since that time; and he said that what in fact the name denotes is a bedstead of a particular pattern, wherever it may be manufactured, and not a bedstead manufactured by the applicants alone.

I do not think that is the true result of the evidence. I think, first of all, that in approaching the consideration of this matter one must have regard to two elements which, one must assume, would have weighed in the mind of Dr. Lawson Tait. Firstly, no doubt, the pattern of bedstead; the fact that it was easily put together, easily portable, and easily taken to pieces for the purpose of being cleaned and kept in a sanitary condition when used in hospitals and other similar institutions. Secondly, the manner in which the article was manufactured.

It is easy to conceive that a bedstead might be made in three parts, but might be so carelessly put together as to destroy, or to minimize to a large extent, the advantages which would otherwise arise from the simplicity of construction; if the parts did not fit accurately, difficulty and delay would be occasioned in taking the bedstead to pieces and putting it together again. I think, also, Dr. Lawson Tait may well have realized that, unless the parts were made to fit with simplicity and with accuracy, there might still exist, even in a bedstead of so few parts, opportunities for the deposit of dirt and other germ-conveying material, calculated to detract considerably from its

usefulness. In my opinion it is therefore fair to the applicants to conclude that what Dr. Lawson Tait did in approving the type of bedstead was, first, to approve the pattern of it, the nature of its construction, and, secondly, the workmanship which was put into it, which minimized, or was calculated to minimize, the evils with which, as a medical man, he was brought into constant contact; and that he was satisfied, from the reputation of the firm to whom he gave the use of his name, with their workmanship, and considered that they might be trusted to construct the bedstead in the form which would make it most efficient.

The applicants, therefore, are entitled to say that the name has become distinctive of bedsteads of that particular pattern, and of their make. Their case is strengthened very much by the evidence which has been produced as to what has taken place in the case of contracts given out by certain unions. I have the printed form of tender which is issued by two of the unions in the neighbourhood of London, namely, Brentford and Hammersmith, and in each case the bedsteads which are to be supplied, in order to fulfil the contract, are described as "Lawson Tait bedsteads"; and I have, further, the evidence that the persons who issued those forms contemplated and intended that the contract should be fulfilled by the supply of bedsteads of the particular pattern and manufactured by the applicants. Further, and above that, I have this, that in the case of the Paddington Union, where a tender had been provisionally accepted from some gentleman in Birmingham to supply "Lawson Tait bedsteads," when the contractor wrote that he could not fulfil the contract by supplying "Lawson Tait" bedsteads — meaning thereby bedsteads manufactured by the applicants—although he offered to supply bedsteads of exactly the same type manufactured elsewhere, the board of guardians declined to go on with the contract upon those terms, and elected to give a rather higher price to other contractors who were prepared to supply goods of that type and manufactured by the applicants.

In these circumstances, I think this is a case in which I should be doing an injustice to the applicants if I were to refuse them the protection which registration affords, and I therefore

EVE J.
1909
WHITFIELDS BEDSTEADS' APPLICATION, *In re.*

propose to declare that the name "Lawson Tait" is to be deemed to be a distinctive mark in respect of bedsteads of the pattern referred to in the agreement of September 29, 1898, and to direct the registrar to proceed with the registration of it in respect of those bedsteads.

Solicitors: *Beale & Co.; Solicitor to the Board of Trade.*

G. M.

C. A.
1909
June 23, 24.

In re FOUNTAINE.
In re DOWLER.
FOUNTAINE *v.* LORD AMHERST.

[1906 F. 1191.]

Trustee—Innocent Breach of Trust—Misappropriation by Solicitor—Limitations, Statute of—Acknowledgment—Settled Fund—Payment of Interest to Tenant for Life—Admission of Existence of Trust Capital—Evidence—Accounts—Admissibility—Entry of Deceased Person against Interest—Trustee Act, 1888 (51 & 52 *Vict. c.* 59), *s.* 8, *sub-s.* 1 (*a*), (*b*).

Two beneficiaries under a will, a mother and son, of whom the son was absolutely entitled to the corpus of certain trust funds subject to the mother's beneficial life interest therein, sought to render a trustee liable to make good to the trust estate certain sums come to his hands and not invested. The trustee employed C. or his firm as solicitors in the execution of the trusts of the will and had allowed the trust funds in question to remain under the control of C., who misappropriated them. The fraud was discovered on C.'s death shortly before the action. The funds sought to be recovered consisted of a specific sum of 31,000*l.*, which had been misappropriated by C. more than six years before the commencement of the action, and certain uninvested balances extending over a period of ten years, as to which an account was asked. The trustee pleaded s. 8 of the Trustee Act, 1888, as a defence to the action as against the mother, in reply to which the mother pleaded an acknowledgment by the trustee by payment to her of interest on the capital sums sought to be recovered within six years of the commencement of the action. At the trial no evidence was tendered in support of this replication except the capital and income accounts of C.'s firm with the trustee, which shewed that interest on a portion of the 31,000*l.* and on the general balance of capital had been credited by the firm to the trustee:—

Held, first, that the accounts were not admissible as being entries by a dead man against interest, because the accounts were not the accounts

of C., but of his firm, and also because they shewed only a payment of interest on debts due from the firm to the trustee, and not a payment of interest on a debt due from the trustee himself; secondly, that a payment of interest by a trustee of a settled fund to a tenant for life within the six years did not constitute an admission by the trustee of the existence of the trust capital which would enure for the benefit of the tenant for life, so as to take the case out of s. 8 of the Trustee Act, 1888.

Held, therefore, that as against the mother the defence of s. 8 of the Trustee Act, 1888, prevailed as to all moneys come to the trustee's hands and not invested more than six years before the commencement of the action.

The Court accordingly made an order on the trustee for payment to the trust estate of the 31,000*l.*, but declared that upon payment of the said sum the trustee would be entitled to receive the income thereof during the life of the mother, and directed an account as to the uninvested balances limited to six years before the commencement of the action.

APPEAL from a decision of Warrington J.

The plaintiffs as beneficiaries under the will of Andrew Fountaine sought to render the defendant Lord Amherst, who was one of the trustees under the will, and the estate of Captain Francis Edward Dowler, a deceased trustee, liable to make good to the trust estate certain sums of money come to the hands of the trustees but not duly invested.

The trustees employed one Charles Cheston, or his firm Cheston & Sons, as solicitors in the execution of the trusts of the will, and the breach of trust alleged against them was that they had allowed the moneys in question to be retained by Cheston, who had misappropriated them. The moneys to which the action related consisted of (1.) moneys forming part of the general estate of the testator; (2.) moneys arising from the sale of chattels settled as heirlooms. The plaintiff Mary Fountaine was entitled for her life to the income of such moneys, and her son, the plaintiff Charles Andrew Fountaine, was absolutely entitled to the corpus of such moneys in remainder expectant on the death of his mother. The testator died in August, 1874. Lord Amherst was one of the original trustees of the will. The other original trustees died in 1877 and 1881 respectively. In April, 1883, Lord Amherst and Captain Dowler were appointed trustees of the settlement effected by the will for the purposes of the Settled Land Act, 1882, and later in the same month

C. A. 1909 — FOUNTAINE, *In re.* DOWLER, *In re.* FOUNTAINE *v.* AMHERST (LORD).

Captain Dowler was appointed trustee of the will jointly with Lord Amherst. In April, 1900, Captain Dowler died. On December 15, 1902, the plaintiffs were appointed co-trustees with Lord Amherst of the will and co-trustees with him for the purposes of the Settled Land Acts. On May 8, 1906, Cheston died, and the breaches of trust were then discovered. On August 17, 1906, this action was commenced. The plaintiffs claimed an immediate order for the making good of three sums of 15,000*l.*, 10,000*l.*, and 6000*l.*, and an account of other moneys received by the trustees and not invested, with an order for the making good of the balance on the account.

The facts proved by the plaintiffs with regard to the three specific sums were as follows: In October, 1887, the sum of 15,000*l.*, the proceeds of certain stock held by the trustees, and representing as to part general estate of the testator and as to the balance proceeds of heirlooms, was advanced to one Bigge on the security of a mortgage dated October 25, 1887. On September 25, 1889, the trustees executed a transfer of this mortgage whereby they acknowledged the receipt of the 15,000*l.*, but the money was paid to Cheston and misappropriated. On February 28, 1893, certain bonds, part of the general trust funds, and certain stock, representing proceeds of heirlooms, were sold for sums amounting together to 10,000*l.*, and on March 16, 1893, this sum was paid into Cheston's private account and misappropriated. On July 29, 1884, the sum of 6000*l.*, representing proceeds of heirlooms, was invested on the security of a mortgage of that date from one Arnal. On April 7, 1893, the trustees executed a reconveyance whereby they acknowledged the receipt of the 6000*l.*, but the money was in fact paid to Cheston and misappropriated.

It was also alleged by the plaintiffs that in addition to the above-mentioned sums from 1895 onwards there were large uninvested balances for which the trustees were accountable.

The substantial defence to the action was s. 8 of the Trustee Act, 1888. This defence, however, by the terms of the section, was only available against the plaintiff Mary Fountaine, the interest of the plaintiff C. A. Fountaine not having fallen into possession. At the trial the Court allowed the reply to be amended

by alleging that the defendant Lord Amherst within the period of six years before the commencement of the action acknowledged the right of the plaintiff Mary Fountaine in respect of the said sums of 15,000*l.* and 6000*l.* and also in respect of the uninvested balances by paying her from time to time interest on those respective sums or treating such interest as paid in account.

This allegation was not admitted, and Mrs. Fountaine was not called, and the plaintiffs tendered no evidence in support of this plea of acknowledgment except copies of the capital and income accounts of the firm of Cheston & Sons with the trustees taken from the firm's books, which shewed that interest on the sums of 15,000*l.* and 6000*l.* and on the general balance of capital was credited by the firm in their accounts with the trustees, and that there was owing to the trustees at the death of Cheston on the balance of the income account a sum of 961*l.* The books did not shew that any interest was ever credited to anybody in respect of the 10,000*l.* Lord Amherst raised no objection to the use of copies, but he objected that the books themselves were not evidence against him.

Warrington J. upheld the objection. He said that no evidence had been tendered as to any authority given to C. Cheston or his firm beyond that implied in the relation of solicitor and client. These accounts were not accounts of the dealings of the trustee with the trust estate kept as between him and the cestui que trust, but they were the accounts of the solicitors kept by them in that capacity as a record of their pecuniary dealings between them and their client. In other words, the statements were not statements made by the trustee or made under his authority, but were statements made by persons accountable to him in fulfilment of their duty as accounting parties. In his opinion, therefore, there was no evidence to support the plaintiffs' contention as to payment of interest. But even if the account were admissible it would, in his opinion, prove no more than a payment by the solicitors of interest on debts owing by them to the trustee, and not a payment of interest on a debt of the trustee himself. The plea of the statute must therefore prevail in favour of both Lord Amherst and Captain Dowler so far as the claim of the plaintiff

C. A. 1909

FOUNTAINE, *In re.* DOWLER, *In re.* FOUNTAINE *v.* AMHERST (LORD).

Mary Fountaine was concerned as to all moneys as to which the cause of action arose prior to August 17, 1900. As regards the account claimed by the plaintiffs the question as to the applicability of the statute would have to be decided either on taking the account or on further consideration in reference to the particular sums with which it might be sought to charge the trustee. The learned judge declared that Lord Amherst and the estate of Captain Dowler were jointly and severally liable to make good to the trust estate the three sums of 15,000*l.*, 10,000*l.*, and 6000*l.*, making together the sum of 31,000*l.*, and he made an order on Lord Amherst for payment of the 31,000*l.* He further declared that the plaintiff Mary Fountaine would not be entitled to the income of the 31,000*l.* so to be paid as aforesaid, but that Lord Amherst would upon payment of the said sum be entitled to receive the income thereof during the lifetime of the said plaintiff; and he directed an inquiry what balances of the trust funds had from time to time since August 17, 1900, been in the hands or under the control of Lord Amherst and had not been invested, other than and except moneys which came to his hands or under his control after December 15, 1902, the date when the plaintiffs were appointed co-trustees with Lord Amherst.

The plaintiffs appealed against this decision in so far as it declared that the plaintiff Mary Fountaine was debarred by the Trustee Act, 1888, from maintaining any action in respect of the 31,000*l.*, and that the defendant Lord Amherst would upon payment of the said sum be entitled to receive the income thereof during her lifetime, and in so far as it directed that the inquiry should only commence from August 17, 1900.

Lord Amherst died after the judgment in the action and before the appeal was brought.

Upjohn, K.C., *Percy Wheeler*, and *A. M. Begg*, for the appellants. The Statute of Limitations does not afford a good defence to the trustees in the circumstances of this case. No personal complicity is alleged against Lord Amherst, but he confided entirely in Cheston and must make good the loss caused by his conduct. Under s. 8, sub-s. 1 (*b*), of the Trustee Act of 1888, a trustee can only plead the Statute of Limitations to the same

extent as if the claim against him had been made in an action of debt for money had and received. In such an action payment of interest within six years would be a bar to the defence of the statute; and these trustees through their agent Cheston paid the supposed income of the funds regularly to Mrs. Fountaine. Trustees who represent by payment of interest that trust funds are in existence cannot plead the statute, and the fact that Lord Amherst did not know of the misapplication of the funds does not enable him to do so.

[FARWELL L.J. Your difficulty is that there is no evidence that Mrs. Fountaine received anything in respect of interest within the six years.]

The Court will assume that interest was paid unless there was evidence to the contrary. Mrs. Fountaine was too ill to give evidence in the Court below. We could not prove payment except through Cheston's account books, which the learned judge refused to admit as evidence. We contend that they ought to have been admitted. They were books kept by solicitors as agents for the trustees. All the items on one side of the account were entries against Cheston's interest, and that is enough to let in the whole of the account: *Higham* v. *Ridgway* (1); *Rowe* v. *Brenton* (2); *Williams* v. *Geaves.* (3) It is no objection to the admissibility of the accounts that they are not proved to be in the handwriting of the deceased man if they were written by his duly authorized agent: *Doe* v. *Hawkins.* (4) Here the entries were made in the ordinary course of business in Cheston's office, and no particular act of acknowledgment or adoption is required.

Further, as regards the uninvested balances Mrs. Fountaine may be able to prove on the inquiry that income was paid to her by the trustee or his agent in respect of those balances under such circumstances as will constitute an acknowledgment by payment of interest so as to take the case out of the statute, but she is precluded from that by the form of the inquiry. We desire that as to those balances the question of the statute may be left open. If this were an action at common law by an

(1) (1808) 10 East, 109; 2 Sm. L. C., 11th ed., p. 327.
(2) (1828) 3 Man. & Ry. 133, 267; 2 Sm. L. C., 11th ed., p. 344.
(3) (1838) 8 Car. & P. 592.
(4) (1841) 2 Q. B. 212.

C. A. 1909 — FOUNTAINE, *In re.* DOWLER, *In re.* FOUNTAINE *v.* AMHERST (LORD).

absolute owner for money had and received, a promise to pay the creditor would be implied from payment of interest within the statutory period under such circumstances as would constitute an acknowledgment; but in the case of a settled fund a slightly different promise must be inferred. It was not, however, intended by the Trustee Act, 1888, to place a trustee in any better position than an ordinary debtor in a common law action. Therefore it is submitted that where a claim is made against a trustee in respect of a settled fund which has come to his hands and has not been invested, and interest is paid by the trustee or his agent to the tenant for life either expressly as interest on the trust fund or under circumstances which shew that it is paid on that footing, that amounts to an admission by the trustee that, either on the day of payment or on the day when the interest accrued, he holds that trust fund upon the trusts of the particular will or settlement in question, and that the law implies a promise from that admission that he will be answerable for the trust fund as on that day; and further that that is an admission made for the benefit of all parties interested in the corpus, the tenant for life as well as the remainderman, according to their respective interests.

In re Somerset (1) is distinguishable because the facts of that case excluded any such admission or acknowledgment as, it is submitted, ought to be implied in the present case. There the cause of action was not that the trustees had got in their hands an uninvested sum of money upon which they had paid interest, but that the trustees had been guilty of negligence in investing the trust funds improperly; it was analogous to an action for damages for trespass, as to which it has been held that no acknowledgment can be relied on to take the case out of the statute. The acknowledgment must be such that the law can imply a new promise from it, and you cannot have an acknowledgment of a trespass so as to imply a new promise. The interest paid to the tenant for life in that case was not, as it is in this case, interest on the very sum sought to be recovered, so as to enable the Court to imply a promise to pay that sum. For the purpose of this replication to the plea of the statute

(1) [1894] 1 Ch. 231.

there is the same distinction between an action for a wrong investment and for a non-investment of trust funds as there is between an action for damages for tort and an action to recover money as money had and received. [They also referred to *Moore* v. *Knight.* (1)]

Buckmaster, K.C., and *Underhill*, for the respondents, the personal representatives of Lord Amherst, were not called upon.

COZENS-HARDY M.R. This is an appeal from a decision of Warrington J. raising points of great importance to the parties, the discussion of which has involved considerations of law; but having listened attentively to Mr. Upjohn's argument I see no reason to doubt that the judgment of the learned judge was correct. The action is brought by Mrs. Fountaine and her son, who is absolutely entitled, subject to her life interest, to very considerable properties, of which the plaintiffs and Lord Amherst were the trustees. The plaintiffs were only appointed trustees with Lord Amherst in 1902. The action alleges, and with sad truth, that a considerable part of the trust estate was lost by reason of the fraud of Mr. Cheston in circumstances under which Lord Amherst and also the estate of Captain Dowler, though entirely innocent of fraud or anything of that kind, are undoubtedly responsible to a certain extent. I will not mention Captain Dowler again, because it is not necessary to distinguish. The learned judge has held, and it is not disputed here, that Lord Amherst—or I should say Lord Amherst's estate, because Lord Amherst himself has died since the action—is liable to make good three sums amounting to 31,000*l.*, which sums it is alleged in the statement of claim were received by Mr. Cheston, and not invested, under such circumstances as make Lord Amherst liable to make them good. That is a declaration which is not appealed against and could not be appealed against by Lord Amherst.

But then a further question is raised. What is the position of the tenant for life in this case? Is or is not the Statute of Limitations—or, to speak more accurately, the enactment in s. 8 of the Trustee Act, 1888—an answer to the demand of the plaintiff

(1) [1891] 1 Ch. 547.

C. A. 1909

FOUNTAINE, *In re.* DOWLER, *In re.* FOUNTAINE v. AMHERST (LORD).

Cozens-Hardy M.R.

the tenant for life? For this purpose, of course, it is right to consider the action as though Mrs. Fountaine were the sole plaintiff. By the defence the statute of 1888 was pleaded, and by way of reply, by permission of the learned judge, an amendment was adopted pleading acknowledgment by payment of interest within six years before the commencement of the action. The learned judge says that whether such acknowledgment has been proved is the only difficult question in the case. The only attempt to prove it was by the production of certain books, or copies of books which were treated as if they were the books themselves, which books I shall have occasion to refer to hereafter. There was no evidence that these books were kept by Cheston & Sons by the instructions of the trustees in such circumstances as would make them the books of the trustees. The learned judge said that no evidence had been tendered as to any authority given to Cheston or his firm beyond that implied in the relation of solicitor and client to the extent to which that relation has admittedly existed. On that ground, therefore, these books cannot be put in evidence as being Lord Amherst's books.

Then it is argued that, though that may be so, still Mr. Cheston is dead, and these books are admissible in evidence on the ground that they are entries by a deceased person against his interest. But there is a fundamental error in that assertion. They are not Cheston's books; they are the books of Cheston & Sons. We have copies of them. The firm of Cheston & Sons have the books. To say that you can make the books of a firm evidence under the principle of *Higham* v. *Ridgway* (1) merely because one member of the firm is dead is to assert a proposition for which in my opinion there is no foundation either upon principle or upon authority.

That being so, there is really not a vestige of evidence to support the amendment in the reply which and which alone was asked for and granted by the learned judge at the trial of the action. It seems to me that the structure of law which has been sought to be raised upon such a foundation as this cannot be supported and must fall to the ground. I therefore think

(1) 10 East, 109; 2 Sm. L. C., 11th ed., p. 327.

that the Statute of Limitations, or rather s. 8 of the Trustee Act, 1888, is applicable to the case and is not got rid of by the reply, because there is no evidence to support the plea of acknowledgment.

Having thus dealt with the main part of the case, there is one further point which I think it is necessary to deal with because of the form in which the judgment is drawn. The judgment first of all deals with these specific items of 31,000*l.* as to which the parties elected to take the decision of the Court then and there. But there was an allegation that there were other moneys uninvested in the hands of the trustees, and an inquiry was directed what balances of the trust funds have from time to time since August 17, 1900, been in the hands or under the control of the defendant Lord Amherst other than and except moneys which came to his hands after December, 1902, when the plaintiffs were appointed trustees. Mr. Upjohn says: True I may have failed as to the specific items, but in the inquiry as to balances which from time to time may have been in the hands of Lord Amherst uninvested I ought not to be tied down to a period of six years before the issue of the writ, but ought to be able to go back to any length of time which the circumstances of the case require—in the present case I think he suggests 1895—and I ought to do that because there might be an implied promise to pay by reason of the receipt of subsequent interest from the trustees. That really involves a consideration of s. 8 of the Trustee Act, 1888, and raises a question as to the meaning of sub-s. 1 (*b*). We start with this idea quite plainly in our minds, that until that Act was passed the defence of the Statute of Limitations would not have applied at all in a case like this. That Act did, with certain limitations and with certain exceptions, give to trustees a protection similar to that which is afforded by the Statute of Limitations. It enacts (sub-s. 1) that "in any action or other proceeding against a trustee or any person claiming through him, except where the claim is founded upon any fraud or fraudulent breach of trust"—that is out of the question here—"to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof still retained by the trustee, or previously

C. A. 1909

FOUNTAINE, *In re.* DOWLER, *In re.* FOUNTAINE *v.* AMHERST (LORD).

Cozens-Hardy M.R.

received by the trustee and converted to his own use"—that is out of the question—"the following provisions shall apply." Then clause (*b*) is, "If the action or other proceeding is brought to recover money or other property, and is one to which no existing Statute of Limitations applies"—that is the present case—"the trustee or person claiming through him shall be entitled to the benefit of and be at liberty to plead the lapse of time as a bar to such action or other proceeding in the like manner and to the like extent as if the claim had been against him in an action of debt for money had and received, but so nevertheless that the statute shall run against a married woman entitled in possession for her separate use, whether with or without a restraint upon anticipation, but shall not begin to run against any beneficiary unless and until the interest of such beneficiary shall be an interest in possession." There are two things which I think are perfectly clear. The Statute of Limitations, of course, is no answer against the son, who is entitled in reversion, and that is the reason why the order under appeal cannot be objected to so far as the trustee is concerned. But it is equally clear that the section is available in favour of the trustee against the tenant for life if the true meaning of this clause be that which it seems to me it really is. A beneficiary under a trust may be absolutely entitled to the corpus. In such a case the claim against the trustee would be to pay over the sum of, say, 10,000*l.*, or whatever it may be, to the trust estate with interest from the date when it has ceased to be paid. To determine the rights of the parties under s. 8 you would consider the claim in exactly the same way as if it had been, what in truth it was not, an action of debt for money had and received. I agree with Mr. Upjohn that any kind of reply or rejoinder which would have been available in an action for money had and received to recover that 10,000*l.* would be available here. How can that apply to the case of a tenant for life? The tenant for life never could recover the principal. The tenant for life is really in the position of a person who has by virtue of some contract with another person a right to an income, say, of 100*l.* a year during his life. If that payment is not made, and an action is brought for money had and received, it seems to me to be really too

plain for argument that no payment of a subsequent instalment of that annuity can in any way be held to imply or to justify an inference of a promise to pay the past instalment of that annuity. In the ordinary case of a capital sum a payment of interest, not by itself, but coupled with other circumstances, may justify an inference of a promise to pay the capital sum in respect of which that interest is paid, and in that way it would defeat and get behind the statute, but, treating this section as having the meaning which I have attributed to it, a payment of interest to the tenant for life under a will or settlement can have no such effect as between the trustee and the tenant for life. I entirely decline to assent to the argument that an admission by a trustee of trust capital is an admission for the benefit of the tenant for life as well as the remainderman so as to take the case out of the section. To accede to that argument would, as it seems to me, really be, I might almost say, to repeal, but certainly to do away with, the beneficial provisions of s. 8, and it is an argument to which I am not prepared to give any weight. I therefore think that the learned judge was quite right in saying that this, which for the present purpose I treat as an action by the tenant for life, was an action in which the tenant for life was not entitled to any account beyond the six years before the writ in this action was issued.

There is one other point, which I will pass by with a word. The learned judge has held, and I think with perfect correctness, that as the plaintiff tenant for life, Mrs. Fountaine, is prevented by this section from recovering interest on this sum of 31,000*l.*, the result is that Lord Amherst himself is entitled to the income of the fund, when made good, during her life. There was some apprehension, which seems to me to be unfounded, but which it was just as well to remove, on Mr. Upjohn's part that this might justify a payment of income to Lord Amherst whilst he was still in default in respect of moneys found due from him under the inquiry, and to meet that, Mr. Buckmaster not objecting, we propose to add to the judgment the words "without prejudice to any application by C. A. Fountaine or any other person as to payment out to Lord Amherst." The addition of those words, however, does not in any way affect the substance of

C. A. 1909

FOUNTAINE, *In re.* DOWLER, *In re.* FOUNTAINE *v.* AMHERST (LORD).

the case, and in my opinion this appeal must be dismissed with costs.

FARWELL L.J. I am of the same opinion. This is one of those unfortunate cases in which two innocent persons are disputing as to which of them is to suffer in consequence of the defalcations of a rogue. The trustee is of course justified in taking advantage of any plea of the Statute of Limitations which is open to him or of any failure to prove her case on the part of the plaintiff Mrs. Fountaine. Two points are raised here. The first relates to interest on three specified sums, 15,000*l.*, 10,000*l.*, and 6000*l.*, as to which a direct issue was raised at the trial and determined by the judge. If the trustees had in fact employed Cheston & Sons as their agents to keep the trustees' accounts on their behalf and Mrs. Fountaine had proved that fact, then the question would have been decided in her favour; but the learned judge has found that there was no evidence that the trustees had done so, and it is quite clear that there was none. The accounts of the solicitors are their own accounts, and in no way are they the trustees' accounts.

Then it was suggested that they could be admitted as evidence because they were entries made by Cheston & Sons or Cheston himself, Cheston being dead, and they were made by a dead man and were against his interest. The answer has been already given by the Master of the Rolls. Cheston, it is true, is dead, but the books were not his books, and there is no evidence to shew that Cheston made the entries. They may have been made by some other member of the firm. Certainly there is no ground that I can see for admitting them, and it would be a most dangerous precedent to admit books which ex hypothesi must be regarded as being probably untrue as evidence in such a case as the present. That disposes of the specific sums as to which a distinct issue was raised and disposed of by the learned judge.

The second point is as to the form, or limitation of the accounts directed. Mrs. Fountaine, the tenant for life, contends that if she can prove payments of income by the trustee within the six years she will be entitled to an account for a greater period. I am unable to accept that view. It appears to me that

since the Act of 1888 in a case like the present, where the trustees do not come within any of the exceptions mentioned in the section and are to be treated as innocent persons, we ought to dismiss from our minds any question of trusteeship and treat the trustees simply as debtors. The section has already been read; it provides in terms that, so far as the remainderman entitled to the corpus is concerned, time does not begin to run against him until the property falls into possession. The tenant for life claiming the annual income as a debt claims it as a succession of sums of money arising de anno in annum—a payment on account of one sum would extend to that one only: all the others are separate and distinct sums. But there is no question here as regards the balance of the income of any one year. The question argued by Mr. Upjohn, as I followed him, was this. The tenant for life, he says, is entitled to the income of a fund. The payment of any sum on account of income is equivalent to an acknowledgment by the trustees that they are liable for the principal sum, and that acknowledgment enures for the benefit of the tenant for life. I find it impossible to accept that argument now that it is clear that this is a question of debtor and creditor and not a question of trustee and cestui que trust. As A. L. Smith L.J. says in *In re Somerset* (1), "It is said—and in this I agree—that the defence is to be treated as if it were a plea of the Statute of Limitations pleaded at common law to an action for money had and received." Take an action at common law by a person entitled to an annual sum for arrears of that annual income. No part payment on account of any of those annual sums could possibly be read as a promise to pay the principal, because the plaintiff is not entitled to the principal, and to say that you can infer from a payment to a person entitled to income alone a promise to pay the principal to which he is not entitled is to contradict the whole basis on which payment on account is treated as taking the case out of the statute. The effect of Mr. Upjohn's argument would be to deprive innocent trustees (for s. 8 only applies to innocent trustees) of the very benefit which the Legislature intended to give them. I agree that the appeal should be dismissed with costs.

(1) [1894] 1 Ch. 231, 268.

C. A.
1909
FOUNTAINE, *In re.* DOWLER, *In re.* FOUNTAINE *v.* AMHERST (LORD).

KENNEDY L.J. With regard to the more important point in this case, it being the point which stands on the threshold of the case, I desire to say a few words. The learned judge in the Court below wavered as to whether or not he should admit or refuse to admit as evidence in regard to certain receipts by the trustees and payments by the trustees certain books which were the books of the firm who undoubtedly to some extent acted for Lord Amherst. I think that the learned judge's second opinion, which he acted upon, was right, and that these books were not admissible as evidence. These books were not books, as Farwell L.J. has said, which were kept by Cheston & Sons according to directions from the trustees that they should keep such accounts. If they had been, no doubt they would have been evidence as against the trustees.

Then it is said they are entries made by a deceased person, Mr. Cheston, who was one of the partners in the firm, and I will assume the principal partner. As to entries made by a deceased person it is well known that they may be admissible under either of two heads; first, that they are entries made, as it is called, against the interest of the person who is proved to have made them, and, secondly, that they are entries made by the deceased person in the ordinary course of his business. The various decisions under those two heads are fully discussed in Smith's Leading Cases in the notes to *Price* v. *Earl of Torrington* (1) and *Higham* v. *Ridgway*. (2) Of course this only becomes material where the entries in question are not entries of the parties to the action. I agree, if it had been shewn in this case that these entries were made by Cheston himself, or by his direction, a much more difficult question than the question we have to decide upon would have arisen, because there is no doubt, I think, that where you have entries made by a person which can fairly be construed as prima facie against his interest, that evidence is admissible as evidence for all purposes irrespective of its effect or value when received. That is the law as laid down by Sir George Jessel in *Taylor* v. *Witham* (3), in which he reviews

(1) (1703) 1 Salk. 285; 2 Sm. L.C., 11th ed., p. 320.
(2) 10 East, 109; 2 Sm. L. C., 11th ed., p. 327.
(3) (1876) 3 Ch. D. 605.

the decisions in *Doe* v. *Vowles* (1) and in some of the earlier cases, and refers to a judgment of Parke B. in *Reg.* v. *Inhabitants of Lower Heyford* (2), whose decision he prefers to the decision of Littledale J. in *Doe* v. *Vowles*. (1) But here it has not been shewn that the entries in question are in fact in the handwriting of Cheston, nor has it been shewn that they were made by a clerk upon his direction, which would be equivalent, I agree, to his own handwriting. The books are not Cheston's books, so that no presumption could arise from that; they are the books of the firm in which he was a partner, a firm in which there were other partners. Certainly there is no proof in this case that they were entries made contemporaneously in the ordinary course of business, because it is said—and I think all the evidence supports it, as pointed out by my brother Warrington—that the entries, so far as they are to be treated as entries of the firm, are entries made in their business, it is true, in one sense, in dealing with the accounts as between themselves and the trustees, but are not entries made in the ordinary course of business as relating to debts due from the trustees or payments made by the trustees to the cestui que trust. My brother Warrington says, "But even if the account were admissible, it would, in my opinion, prove no more than a payment by the solicitors of interest on debts owing by them to the trustee, and not a payment of interest on a debt of the trustee himself." He is speaking, no doubt, of the value of the documents, if receivable, but the reasoning appears to me to be applicable if one had to test the question of the admissibility of this evidence and decide one way or the other on the question whether these entries were made in the ordinary course of business. If there was a course of business in which Cheston could be shewn to have made or directed to be made these entries, they might have become admissible on that ground, though really it was not so much on that ground, as I follow Mr. Upjohn, that he is putting his case as that these entries were entries against interest.

On the whole, for the reasons I have given, I do not think the learned judge was wrong in refusing to admit these books as evidence. On the question with which he proceeds to deal as

(1) (1833) 1 Moo. & R. 261. (2) (1840) 2 Sm. L. C., 11th ed., p. 339.

C. A. 1909 FOUNTAINE, *In re.* DOWLER, *In re.* FOUNTAINE *v.* AMHERST. (LORD).

to the position of the case as it stands if those entries were admitted I desire to add nothing to what has fallen from the other members of the Court.

Solicitors: *Duffield, Bruty & Co.; Lawrance, Webster, Messer & Nicholls.*

H. B. H.

C. A. 1909 *July* 29.

In re PETERSON.

Solicitor — Costs — Taxation — Chancery or Parliamentary Scale — Costs of obtaining Light Railway Order—Light Railways Act, 1896 (59 & 60 *Vict. c.* 48), *ss.* 2, 7, 10.

The costs of obtaining an order under the Light Railways Act, 1896, are taxable on the Chancery and not on the parliamentary scale.

In re Morley, (1875) L. R. 20 Eq. 17, applied.

APPEAL from an order of Eve J. upon a summons to review taxation.

The applicant had been employed as solicitor by the promoters of the Lampeter, Aberayron, and New Quay Light Railway Company in an application to the Light Railway Commissioners for an order under the Light Railways Act, 1896, for the construction of certain light railways. The order was obtained and was subsequently confirmed by the Board of Trade subject to certain modifications.

Upon the taxation of the bill of costs relating to this application the taxing Master taxed the costs not upon the parliamentary scale, but upon the Chancery scale "as between solicitor and client General Business."

The applicant objected that the costs ought to be taxed according to the parliamentary scale, and he took out a summons to review to determine the validity of this objection.

Eve J. was of opinion that the object of the Legislature in passing the Light Railways Act was to prevent the expense incurred by parliamentary proceedings, and that the promoters of a light railway under that Act were in this respect in the same position as the promoters of a tramway under the Tramways

Act, 1870. The case was therefore covered by *In re Morley* (1), and the applicant's objection must be overruled.

The applicant appealed.

G. H. Devonshire, for the appellant. *In re Morley* (1) was a decision as to a provisional order under the Tramways Act, 1870, and does not apply to proceedings under the Light Railways Act, 1896. Jessel M.R. assumed that his judgment correctly expressed the intention of Parliament, but, if so, Parliament subsequently changed its mind, because so far as provisional orders are concerned *In re Morley* (1) is overruled by the House of Commons Costs Taxation Act, 1879, ss. 2, 3. Substantially the same procedure is adopted for obtaining an order under the Light Railways Act as for obtaining a private Bill before Parliament. The preparation of a light railway order is parliamentary or quasi-parliamentary work, and the costs of that work ought to be taxed according to the parliamentary scale.

[KENNEDY L.J. referred to the Light Railways Act, 1896, ss. 1, 2, 7, 9, 10.]

The work is of the same kind whether the promotion is effected by means of a private Bill, a provisional order, or a light railway order. *In re Morley* (1) was wrongly decided and ought to be overruled. The jurisdiction of the taxing Master to tax the costs of parliamentary matters is conceded: *Lurgan Urban Council to Moore and Johnston* (2); the only question is what scale he ought to have applied in this case.

Tyldesley Jones, for the respondents, the promoters, was not called upon.

COZENS-HARDY M.R. I think there is no doubt that this appeal ought to be dismissed. The House of Commons Costs Taxation Act, 1847, in s. 2, defines in perfectly clear language the proceedings in respect of which what is commonly called the parliamentary scale shall be applied, and by s. 3 the costs of such proceedings are to be taxed by an officer of the House of Commons. Thirty-four years ago the matter came before Jessel M.R. in *In re Morley* (1), when he had to consider

(1) L. R. 20 Eq. 17.

(2) [1906] 1 I. R. 599, 604

C. A. 1909 — PETERSON, *In re.* — Cozens-Hardy M.R.

whether the parliamentary scale applied to provisional orders where there are no proceedings in Parliament, and he held, on grounds which commend themselves to me, that there was no justification for incorporating the parliamentary scale of costs into proceedings of that kind. Then Parliament in 1879, four years later, altered the law, not in the least in the sense of saying or indicating that Sir G. Jessel's view was wrong, but they thought fit to enact that the House of Commons Costs Taxation Act, 1847, should be extended to the case of promoting provisional orders and to certain other cases. The preamble of the Act is quite clear: "Whereas it is expedient that the provisions of the House of Commons Costs Taxation Act, 1847, should be extended and made applicable to other cases than those mentioned in the said Act." It is extended to certain particular cases which were not mentioned in the Act of 1847, but it is not extended to proceedings under the Light Railways Act, which was not passed until 1896. There is nothing in the Act of 1896 itself to extend the operation of the Act of 1847 to any other cases than those expressly mentioned, and I think it would be altogether wrong for us to say that, these proceedings being analogous to parliamentary proceedings, or, to use the expression employed by counsel in argument, "quasi-parliamentary proceedings," the same principle ought to apply. I concur with the reasoning of Jessel M.R. in *In re Morley*. (1) That decision has never been doubted or questioned so far as I am aware, and even if I doubted its correctness I should hesitate to disturb a decision which has been standing for thirty-four years. I think that this appeal fails and must be dismissed.

Farwell L.J. I agree. The Act of 1879 really added to s. 2 of the Act of 1847 three or four lines to shew what are parliamentary costs in addition to those already specified. It does not indicate that *In re Morley* (1) was wrongly decided, and Sir G. Jessel gives a very good reason why the Court should not extend the parliamentary scale to cases in which there is no invocation of Parliament at all. I am not favourably impressed by the argument founded on the word "quasi." Lord Bowen used to

(1) L. R. 20 Eq. 17.

say, when counsel called a man a quasi-trustee, that he understood him to mean that he knew the man was not but wished that he were a trustee.

KENNEDY L.J. I agree.

Solicitors: *E. W. I. Peterson; Woodcock Ryland & Parker.*

H. B. H.

ASCHERSON *v.* TREDEGAR DRY DOCK AND WHARF COMPANY, LIMITED.

[1908 A. 1934.]

Principal and Surety—Indemnity—Action Quia timet—Present Debt—Joint and Several Guarantee of Overdraft at Bank—No Demand by Bank for Payment—Parties.

Where there is an actual accrued debt secured by a guarantee and one of several co-sureties is liable, and admits liability for the amount guaranteed, he has a right in equity to compel the principal debtor to relieve him from his liability by paying off the debt.

This equitable relief is not limited to cases where the creditor has refused to sue the principal debtor.

Ranelaugh v. *Hayes*, (1683) 1 Vern. 189; *Nisbet* v. *Smith*, (1789) 2 Bro. C. C. 579; *Wooldridge* v. *Norris*, (1868) L. R. 6 Eq. 410; and *Mathews* v. *Saurin*, (1893) 31 L. R. Ir. 181, followed.

Suggested limitation in *Padwick* v. *Stanley*, (1852) 9 Hare, 627, not followed.

Dale & Perry v. *Lolley*, (1808) 2 Bro. C. C. 582, n., and *Hughes-Hallett* v. *Indian Mammoth Gold Mines Co.*, (1882) 22 Ch. D. 561, distinguished.

Semble neither the creditor nor the co-sureties need be parties.

ACTION.

By an agreement under hand, dated August 27, 1902, Edward Ascherson and four other directors of the defendant company gave the London City and Midland Bank, Limited, a joint and several guarantee to secure the overdraft from time to time on the defendant company's current account.

The guarantors' liability was limited to 20,000*l.* and interest.

It was provided that "This guarantee shall be a continuing guarantee and in full force until three calendar months after

SWINFEN EADY J.

1909

ASCHERSON v. TREDEGAR DRY DOCK AND WHARF COMPANY, LIMITED.

each of us shall have given or sent you notice in writing under our respective hands of our intention to discontinue and determine the same."

Edward Ascherson died on June 24, 1908, having appointed the plaintiffs his executors. The bank heard of his death on June 30, 1908, and at once closed the old account with an overdraft of 17,219*l.* and opened a new account for the defendant company under the continuing guarantee. The bank informed the defendant company of this change in the account, and obtained the names of the executors, to whom they gave formal notice of their liability under the guarantee, but they did not demand payment of the overdraft either from the defendant company or the guarantors. After certain intermediate correspondence between the various parties, the plaintiffs wrote on December 3, 1908, asking the bank to let them know the extent of their testator's liability at his death and how far it had been reduced by sums subsequently paid by the defendant company into the account. On December 5, 1908, the bank replied as follows: "The balance due to the bank on June 30 last, the date on which we received notice of the death of Mr. Edward Ascherson, was 17,219*l.* On that day the account was stopped, and all transactions have gone through a new account since that date, so that our claim against the estate of the late Mr. Edward Ascherson is 17,219*l.* with interest thereon from June 30 last."

The plaintiffs, being desirous of winding up their testator's estate, requested the defendant company to discharge this liability, and on their refusal brought this action against the defendant company for a declaration that the plaintiffs as executors of Edward Ascherson and his estate were entitled to be discharged and exonerated from all liability under the guarantee by payment by the defendant company to the bank of the said sum of 17,219*l.* with interest from June 30, 1908, or so much thereof as was now owing by the defendant company to the bank, and for an order for payment accordingly.

Hon. E. C. Macnaghten, K.C., and *Sargant*, for the plaintiffs. We are liable for the 17,219*l.* as sureties and are entitled to call

on the principal debtor to pay the debt so as to relieve us of our liability: *Ranelaugh* v. *Hayes* (1); *Lee* v. *Rook* (2); *Bechervaise* v. *Lewis*. (3) The suggestion of Turner V.-C. in *Padwick* v. *Stanley* (4) that the jurisdiction is limited to cases "where the creditor has a right to sue the debtor and refuses to exercise that right" was disapproved in *Mathews* v. *Saurin*. (5)

Micklem, K.C., and *Fairfax Luxmoore*, for the defendant company. The general principle is not disputed, but in this case the action is premature and unnecessary. There is no existing ascertained debt on which the bank could sue. They closed the old account on June 30, 1908, so as to avoid the rule in *Clayton's Case*. (6) This was authorized by *In re Sherry*. (7) The plaintiffs are not liable for advances made after notice of their testator's death: *Coulthart* v. *Clementson* (8); but in all other respects the continuing guarantee is still intact: *Beckett & Co.* v. *Addyman*. (9) The effect of this is that the plaintiffs' maximum liability is fixed at 17,219*l.*, but their actual liability varies from day to day. For instance, on December 31, 1908, the total overdraft on the old and new accounts was only 14,016*l.*, and on June 28, 1909, it was only 10,581*l.*

The plaintiffs are in no danger of loss, and if they wait six years from June 30, 1908, without being sued, they will be protected by the Statutes of Limitation: *Parr's Banking Co.* v. *Yates*. (10)

The jurisdiction to relieve the surety is limited to "cases where the creditor has a right to sue the debtor and refuses to exercise that right": *Padwick* v. *Stanley*. (4) The disapproval of this view in *Mathews* v. *Saurin* (5) was only obiter, as in that case the creditor had sued. The bank would be extremely unlikely to sue the principal debtors for the overdraft without notice, though they have possibly a legal right to do so: *Rouse* v. *Bradford Banking Co.* (11) But in the case of a surety demand for payment is a condition precedent to the right to sue:

(1) 1 Vern. 189.
(2) (1730) Mos. 318.
(3) (1872) L. R. 7 C. P. 372, 377.
(4) 9 Hare, 627.
(5) 31 L. R. Ir. 181.
(6) (1816) 1 Mer. 572.
(7) (1884) 25 Ch. D. 692.
(8) (1879) 5 Q. B. D. 42.
(9) (1882) 9 Q. B. D. 783.
(10) [1898] 2 Q. B. 460.
(11) [1894] A. C. 586, 596.

SWINFEN EADY J.

1909

ASCHERSON v. TREDEGAR DRY DOCK AND WHARF COMPANY, LIMITED.

In re Brown's Estate. (1) *Ranelaugh* v. *Hayes* (2) was disapproved in *Lloyd* v. *Dimmack.* (3)

[SWINFEN EADY J. Only on the toties quoties form of order.]

It was also disapproved in *Hughes-Hallett* v. *Indian Mammoth Gold Mines Co.* (4)

[SWINFEN EADY J. In that case there was no present liability, but merely a possibility of a future call on the shares.]

In *Nisbet* v. *Smith* (5) Lord Thurlow said: "It is clear and never has been disputed that a surety, generally speaking, may come into this Court, and apply for the purpose of compelling the principal debtor for whom he is surety to pay in the money, and deliver him from the obligation." But this general proposition was considerably limited in *Dale & Perry* v. *Lolley* (6), where it was decreed per totam curiam in the Exchequer that "a bill will not lie upon any general equity by a surety against the principal debtor, to have an indemnity, or to have the money paid into Court, where no further time has been given, where the day of payment has not elapsed, and the surety has not been damnified, or is not in evident danger of being so; or unless a distinct agreement can be proved that it should be done whenever the plaintiff called on him for it." In that case the bill was dismissed with costs, the Court holding that Lord Thurlow's allusion to the surety's equity was "applicable only to the above, and that any other decision would quite overthrow the very reason of a party's becoming surety at all, and be absurd."

[SWINFEN EADY J. What was the liability in that case?]

Mr. Luxmoore has searched the record and finds it was a two years' bill, of which about four months had run.

[SWINFEN EADY J. Of course, if the money is not due and payable, the surety cannot compel the debtor to pay it.]

In the present case the actual liability is not ascertained, the day of payment has not elapsed, and the plaintiffs are in no evident danger of being damnified.

In *Clarke* v. *Stamford* (7) a decree was made that the

(1) [1893] 2 Ch. 300.
(2) 1 Vern. 189.
(3) (1877) 7 Ch. D. 398.
(4) 22 Ch. D. 561.
(5) 2 Bro. C. C. 579, 582.
(6) 2 Bro. C. C. 582, n.
(7) (1801) 2 Bro. C. C. 583, n.

principal should pay the debt and discharge the surety. The obligee was a party and acted upon the decree. The case came on again upon motion before Lord Eldon in 1805. The applicant's counsel said that such a decree ought never to have been made, and Lord Eldon himself observed that it was a strange and anomalous decree. The record shews that the bill was for administration. The true test is whether the debt is actually payable so that the surety is in a position to be sued: *Hungerford* v. *Hungerford* (1); *Antrobus* v. *Davidson* (2); *Wooldridge* v. *Norris*. (3)

[SWINFEN EADY J. *Wooldridge* v. *Norris* (3) is a strong case against you. The surety had taken an indemnity for moneys that he might be "called upon and be liable and compelled to pay" under his suretyship. He was allowed to enforce the indemnity as soon as he was called on to pay, though he had not in fact been compelled to pay anything.]

In the present case the bank are not parties, so that an order directing payment of an unascertained sum to them would be somewhat anomalous: *Wolmershausen* v. *Gullick* (4), where most of the authorities on the subject are considered.

[SWINFEN EADY J. That was a case of contribution, where judgment had actually been obtained against the surety, who was seeking to make his co-sureties contribute.]

The bank were made parties in *Mathews* v. *Saurin* (5), and it would have been more convenient that the bank and the co-sureties should have been made parties in the present case in order that the respective rights might be fully adjusted. We do not, however, press the point.

Hon. E. C. Macnaghten, K.C., in reply.

SWINFEN EADY J. (after stating the facts). The object of the present action is to compel the defendant company, the principal

(1) (1708) Gilb. 67, 69.
(2) (1817) 3 Mer. 569, 579.
(3) L. R. 6 Eq. 410.
(4) [1893] 2 Ch. 514. The brief statement of *Wooldridge* v. *Norris* at p. 525 should be amended so as to read "a surety obtained an order for indemnity and payment by the executors of a person who had covenanted to indemnify him against his liability as surety, although the surety had not paid or been sued."
(5) 31 L. R. Ir. 181.

SWINFEN EADY J.

1909

ASCHERSON v. TREDEGAR DRY DOCK AND WHARF COMPANY, LIMITED.

debtors, to pay off the amount owing by them to the bank and relieve and release the executors of the deceased.

The defendant company conceded that the form of the guarantee in the present case was indistinguishable from that in *Coulthart* v. *Clementson* (1), where it was held that a guarantee in that form was revoked as to subsequent advances by notice of the guarantor's death; and the bank have acted upon that footing. They have drawn the line on June 30, 1908, when they received notice of the death; they then closed the old account and opened a fresh account with the defendant company as from that date.

It was admitted that the bank were entitled to do that, and were not bound to credit the closed account with the subsequent payments in so as, by the application of the rule in *Clayton's Case* (2), to relieve the deceased's estate, but were entitled to treat the 17,219*l.* as still owing, for the purpose of the guarantee, with interest from June 30, 1908, in accordance with *In re Sherry.* (3)

It was contended that until the guarantee had been determined and the overdraft called in no right of action accrued to the bank against the sureties, although, if the present accounts continued for more than six years, all claim against the deceased's estate would be barred by the Statutes of Limitation under the decision in *Parr's Banking Co.* v. *Yates.* (4)

That contention is not well founded. Repayment of the overdraft may be enforced by the bank at any time; there is no evidence of any contract binding the bank to allow an overdraft, for any definite time, or at all. In my opinion the true position is this. The bank have a present right of action against the executors of Edward Ascherson for the 17,219*l.* owing on June 30, 1908, with subsequent interest, and have claimed that amount by their letter of December 5, 1908.

It has been the law of the Court for very many years that a surety is entitled to come into equity to compel the principal debtor to pay what is due from him, to the intent that the surety may be relieved.

(1) 5 Q. B. D. 42.
(2) 1 Mer. 572.
(3) 25 Ch. D. 692.
(4) [1898] 2 Q. B. 460.

In *Ranelaugh* v. *Hayes* (1) the Lord Keeper "compared it to the case of a counter-bond; where although the surety is not troubled or molested for the debt, yet at any time after the money becomes payable on the original bond, this Court will decree the principal"—that is, the principal debtor—"to discharge the debt; it being unreasonable that a man should always have such a cloud hang over him." Then in *Nisbet* v. *Smith* (2) the Lord Chancellor says: "It is clear and never has been disputed that a surety, generally speaking, may come into this Court, and apply for the purpose of compelling the principal debtor for whom he is surety to pay in the money, and deliver him from the obligation."

A recent instance of that was the case of *Wooldridge* v. *Norris*. (3) In that case Veal the younger borrowed 50*l*. from the trustees of a charity, the plaintiff and Hopkins entering into bond A as sureties for its repayment. Veal the elder was counter-surety under bond B providing for payment to the plaintiff and Hopkins of "all such sum and sums of money, costs, damages, and expenses which they respectively may be called upon, and be liable and compelled to pay" under bond A, and saving them harmless and keeping them indemnified from all actions, suits, or other proceedings under bond A. The principal debtor Veal the younger not having paid the 50*l*., the trustees of the charity applied to the plaintiff, one of the sureties under bond A, for payment. The counter-surety under bond B being dead, the plaintiff filed a bill against his executors charging that the trustees of the charity had recently applied to the plaintiff for payment of the 50*l*. secured by bond A, and the plaintiff thereupon applied to the defendants to pay the same, but they alleged they had no funds, and praying for administration, and for an order that the defendants might be directed to pay the 50*l*. out of the counter-surety's estate and to indemnify the plaintiff against all claims under bond A. To this bill the defendants demurred for want of equity. They contended that the plaintiff, though called upon to pay the 50*l*. as surety under bond A, had not in fact paid anything to the trustees of the charity, and

(1) 1 Vern. 189. (2) 2 Bro. C. C. 579, 582.
(3) L. R. 6 Eq. 410, 413.

SWINFEN EADY J.
1909
ASCHERSON v. TREDEGAR DRY DOCK AND WHARF COMPANY, LIMITED.

that until he had done so he had no right of action or suit against the counter-surety or his executors under bond B. Giffard V.-C. said: "In this case the bill, which is in the nature of a bill quia timet, is one of a kind which is rather unusual in modern times. The objections which were taken to it were, first, that a state of circumstances had not arisen to give the plaintiff the right which he claims, of filing the bill; and, secondly, that it was not a bill on behalf of the plaintiff and all other creditors. Now, as regards the right of a plaintiff to file a bill quia timet, the principle is clearly laid down by Lord Redesdale in these terms (1): 'A Court of Equity will also prevent injury in some cases by interposing before any actual injury has been suffered; by a bill which has been sometimes called a bill quia timet, in analogy to proceedings at the common law, where in some cases a writ may be maintained before any molestation, distress, or impleading. Thus, a surety may file a bill to compel the debtor on a bond in which he has joined to pay the debt when due, whether the surety has been actually sued for it or not; and upon a covenant to save harmless a bill may be filed to relieve the covenantee under similar circumstances.'"

Then it was argued, although, perhaps, I may say, but faintly, that in *Padwick* v. *Stanley* (2) Turner V.-C. limited the cases in which the Court of Equity exercised that jurisdiction to "cases where the creditor has a right to sue the debtor and refuses to exercise that right."

In my opinion the cases in which equity has granted relief to sureties have not been limited to cases where the creditor has refused to sue. In *Wooldridge* v. *Norris* (3) that element did not exist.

In *Mathews* v. *Saurin* (4) it was determined that "when there is an actual accrued debt,"—as there is in the present case—"and the surety is liable and admits liability for the amount guaranteed,"—which, again, is the present case—"he has a right to compel the principal debtor to relieve him from his liability by paying off the debt. In order to support such an action it is

(1) Mitford on Pleading, 5th ed., pp. 171, 172.
(2) 9 Hare, 627.
(3) L. R. 6 Eq. 410.
(4) 31 L. R. Ir. 181.

not necessary to prove that the creditor has refused to exercise his right to sue the principal debtor."

The suggested limitation in *Padwick* v. *Stanley* (1) was disapproved. It is true that the disapproval was only obiter, because the creditor had, in fact, brought an action against the principal debtor.

The present action is not like *Dale & Perry* v. *Lolley* (2), where a surety brought an action to compel the debtor to pay a bill not due for twenty months, or *Hughes-Hallett* v. *Indian Mammoth Gold Mines Co.* (3), where he asked for indemnity against a future contingent liability. The obligation of the executors is a present liability, and they are entitled to the relief they ask. There must be a declaration that the plaintiffs, as executors of the deceased, are entitled to be discharged and exonerated from all liability under the guarantee by payment by the defendant company to the bank of the 17,219*l.*, with interest from June 30, 1908, or so much thereof as is now owing by the defendant company to the bank.

There must be an order for the defendant company to pay the amount to the bank so as to satisfy the plaintiffs' liability, with liberty to apply in the event of non-payment. The costs will follow the event.

Solicitors: *Lawrance, Webster, Messer & Nicholls; Neish, Howell & Haldane.*

(1) 9 Hare, 627. (2) 2 Bro. C. C. 582, n.
(3) 22 Ch. D. 561.

G. R. A.

WARRINGTON J.

1909

July 1, 2, 6, 7

In re DONALD.

MOORE *v.* SOMERSET.

[1909 D. 302.]

Will—Construction—Gifts to Volunteers, Yeomanry, and Militia—Transfers of Volunteer and Yeomanry Units to Territorial Force and Militia Units to Army Reserve—"Existing Institutions"—Payment to County Associations—Gift to Commanding Officer of Militia Unit "for the mess of that regiment or for the poor of the regiment"—Charitable Gift—Territorial and Reserve Forces Act, 1907 (7 *Edw.* 7, *c.* 9), *ss.* 29, 34—*Orders in Council of March* 19 *and April* 9, 1908.

Testator by his will, dated in 1893, devised and bequeathed the residue of his estate to trustees upon trust for sale, and out of the proceeds to pay legacies of 50*l.* each "to the officers commanding the Volunteer Rifles at Bournemouth, the Volunteer Artillery at Bournemouth, and the Volunteer Rifles at Weymouth, for the use of their respective corps," and a legacy of 100*l.* "to the officer commanding the Northamptonshire Militia for the mess of that regiment or for the poor of the regiment." By a first codicil the testator directed his trustees to divide the residue into eight parts, and to accumulate three of such parts for seven years from his decease, and then to divide the accumulated fund "rateably among the persons and institutions to whom and to which I have given pecuniary legacies (and the foregoing five-eighth shares of residue by this codicil to my will), or such of them as shall be alive and existing in proportion to their respective shares of residue. . . . . In the event, however, of any such legatee dying or any such institution ceasing to exist prior to the expiration of such seven years, the share to which he or it would have been entitled shall go to my next of kin." By an eighth codicil the testator bequeathed "to the officer commanding the 1st Battalion Lanarkshire Volunteers the sum of 1000*l.* and to the officers commanding the Dorsetshire Yeomanry Cavalry and the London Scottish Volunteers respectively the sum of 500*l.* each"; and he declared that the aforesaid respective sums should be held by the commanding officers "for any purpose or purposes for the benefit of their respective corps it being my intention that the said funds shall be deemed private funds and be held and expended entirely independently of Government control." The testator died in January, 1902, and in January, 1909, the seven years limited by his will for accumulation expired and the fund became distributable. In the interval the Territorial and Reserve Forces Act, 1907, was passed, which, by s. 29 and an Order in Council of March 19, 1908, made thereunder, transferred the Volunteer and Yeomanry units to the Territorial Force, and by s. 34 and an Order in Council of April 9, 1908, transferred the Militia units to the Army Reserve:—

Held, that the effect of the Act and Orders in Council was not to

destroy the Volunteer, Yeomanry, and Militia units but to reorganize them, and accordingly that those units had not ceased to exist.

Held, therefore, that the legacies bequeathed to the Volunteer and Yeomanry units were payable to the several county associations established under the Act on behalf of the units of the Territorial Force which now represented those units.

Held, also, that the legacy "to the officer commanding the Northamptonshire Militia for the mess of that regiment or for the poor of the regiment" was a good charitable gift, and was payable to the officer commanding the unit of the Army Reserve which now represented the Northamptonshire Militia.

In re Good, [1905] 2 Ch. 60, followed.

ORIGINATING SUMMONS.

Thomas Donald, by his will dated December 23, 1893, devised and bequeathed the residue of his real and personal estate to his trustees upon trust to sell and convert and out of the proceeds to pay, among other legacies, legacies of 50*l.* each "to the officers commanding the Volunteer Rifles at Bournemouth the Volunteer Artillery at Bournemouth and the Volunteer Rifles at Weymouth for the use of their respective corps," and a legacy of 100*l.* "to the officer commanding the Northampton Militia for the mess of that regiment or for the poor of the regiment."

By a first codicil, dated October 10, 1895, the testator directed that his trustees should stand possessed of the residue of his estate upon trust to divide the same into eight equal portions and to pay five of such portions as therein mentioned, and as to the three remaining portions in trust to accumulate the same for seven years after his decease and then "to divide the accumulated fund rateably among the persons and institutions to whom and to which I have given pecuniary legacies (and the foregoing five-eighth shares of residue by this codicil to my will) or such of them as shall then be alive and existing in proportion to their respective legacies and shares of residue. . . . . In the event however of any such legatee dying or any such institution ceasing to exist prior to the expiration of such seven years the share to which he or it would have been entitled shall go to my next of kin."

By an eighth codicil, dated January 22, 1902, the testator bequeathed "To the officer commanding the 1st Battalion Lanarkshire Volunteers . . . . the sum of 1000*l.* and to the

WARRINGTON J.
1909
DONALD, *In re.* MOORE *v.* SOMERSET.

officers commanding the Dorsetshire Yeomanry Cavalry and the London Scottish Volunteers respectively the sum of 500*l.* each And I declare that the aforesaid respective sums shall be held by the said respective commanding officers for any purpose or purposes which they may think to be for the benefit of their respective corps it being my intention that the said sums shall be deemed private funds and be held and expended entirely independently of Government control the receipts of the commanding officers being a sufficient discharge to my trustees."

The testator died on January 28, 1902.

On January 28, 1909, the seven years limited for accumulation expired, and thereupon the fund became distributable.

In the interval between the testator's death and the time for distribution the Territorial and Reserve Forces Act, 1907, was passed, the object of which was "to provide for the reorganisation of His Majesty's military forces and for that purpose to authorise the establishment of County Associations, and the raising and maintenance of a Territorial Force." By s. 29 of the Act and an Order in Council dated March 19, 1908, made thereunder, the Volunteer and Yeomanry units were transferred to the Territorial Force, and by s. 34 and an Order in Council dated April 9, 1908, made thereunder the Militia units were transferred to the Army Reserve. The material provisions of the Act and Orders are fully stated in the judgment.

The present summons was taken out by one of the executors and trustees of the will and codicils for the determination of the question (inter alia) whether, having regard to the position of the Territorial Forces and the events which had happened, any and what legatees were entitled to shares of the accumulated fund in respect of the legacies bequeathed by the will and codicils.

Edward Beaumont, for the summons. The question is whether any of the military institutions indicated by the testator have ceased to exist by reason of the passing of the Territorial and Reserve Forces Act, 1907, and the Orders in Council made thereunder.

P. W. Baker-Wilbraham (*Sargant* with him), for the Attorney-General. The War Office is interested in supporting these legacies

as they would go to relieve the War Office funds. I therefore propose to argue the case on behalf of the legatees under the will and first codicil, who are not separately represented.

The first three legacies stand upon the same footing. The effect of ss. 29 and 34 of the Act of 1907 and the Orders made thereunder was to transfer the Volunteer, Yeomanry, and Militia units as existing entities to the Territorial and Reserve Forces, of which they thenceforth became units, but under different names. The fact that they were so "transferred" negatives the destruction of those units. They are therefore still existing institutions within the meaning of the first codicil. By s. 29, sub-s. 3 (*c*), of the Act provision is made for the transfer of property of Volunteer and Yeomanry units to the county associations established by the Act. The legacies given to the three Volunteer bodies are therefore payable to the county associations by which they are now represented.

The legacy to the officer commanding the Northamptonshire Militia "for the mess of that regiment or for the poor of the regiment" is a good charitable gift: *In re Good* (1), and is payable to the officer commanding the unit of the Special Reserve representing that body as the proper person to administer it.

Dighton Pollock, for the officer commanding the 5th Battalion of the Cameronians (Scottish Rifles), which now represented the 1st Battalion Lanarkshire Volunteers, and

W. R. Sheldon, for the officer commanding the Dorset Yeomanry, which now represented the Dorsetshire Yeomanry Cavalry, adopted the same argument and stated that they were willing that the legacies should be paid to the respective county associations.

Herbert Brown, for the officer commanding the 14th Battalion County of London (London Scottish) Regiment, which now represented the London Scottish Volunteers. Having regard to the provision in the eighth codicil that the funds are to be "deemed private funds and be held and expended entirely independently of Government control," it is submitted that a discretionary trust is thereby imposed upon the commanding officers to apply the funds for the benefit of their respective corps. The legacy ought

(1) [1905] 2 Ch. 60.

WARRINGTON J.
1909
DONALD, *In re.* MOORE *v.* SOMERSET.

therefore to be paid to the commanding officer, and not to the county association. The case falls within clause 7 of the Order in Council of March 19, 1908, which relates to private trusts, and not within clause 5.

Ashworth James, for the next of kin. These legacies were good charitable gifts in the first instance, but they have failed by reason of the institutions to which they were originally given having ceased to exist before the time fixed for distribution. The "Territorial Force" which the Act by s. 6 authorizes to be raised and maintained is a brand-new force. The members of it are enlisted, not enrolled, as were the Volunteers under the Volunteer Act, 1863. The conditions of service, organization, discipline, mode of service, and pay, all are different from those which prevailed in the case of the old Volunteer units. The units are not the Volunteer units under the Act of 1863, but new units under the Act of 1907. The case is analogous to that of the reconstruction of a company. The members of the old company may come into the new company, and if they do so they cease to be members of the old body and become members of the new. The provisions of s. 29 are merely transitory. Under that section the Volunteer units become provisionally members of the Territorial Force. The institutions contemplated by the testator were something entirely different from those under the control of the county associations. He intended to benefit something in the nature of private institutions.

H. Terrell, K.C., and *R. M. Pattisson*, and *Christopher James*, for parties who were not interested in this question.

WARRINGTON J. The testator in this case by his will and the eighth codicil thereto made certain bequests in favour of the commanding officers of certain Volunteer, Yeomanry, and Militia corps. By the first codicil he directed a certain portion of his residuary estate to be accumulated for seven years and then to be divided rateably among the persons and institutions to whom and to which he had given pecuniary legacies. Then he provided: "In the event however of any such legatee dying or any such institution ceasing to exist prior to the expiration of such seven years the share to which he or it would have been entitled

shall go to my next of kin." It is contended on behalf of the next of kin that the Volunteers, Yeomanry, and Militia are institutions which have ceased to exist by virtue of the Territorial and Reserve Forces Act, 1907, and that the proportion of the share of residue now attributable to those legacies ought to be paid to the next of kin. The legacies are these: First in the will there is a legacy to the officers commanding the Volunteer Rifles at Bournemouth, the Volunteer Artillery at Bournemouth, and the Volunteer Rifles at Weymouth for the use of their respective corps, 50*l.* each. Then, "To the officer commanding the Northamptonshire Militia for the mess of that regiment or for the poor of the regiment 100*l.*" And then in the eighth codicil the testator says: "To the officer commanding the 1st Battalion Lanarkshire Volunteers . . . . the sum of 1000*l.*, and to the officers commanding the Dorsetshire Yeomanry Cavalry and the London Scottish Volunteers respectively the sum of 500*l.* each And I declare that the aforesaid respective sums shall be held by the said commanding officers for any purpose or purposes which they may think to be for the benefit of their respective corps it being my intention that the said sums shall be deemed private funds and be held and expended entirely independently of Government control the receipts of the commanding officers being a sufficient discharge to my trustees."

Now the first question which arises is whether, having regard to the Territorial and Reserve Forces Act, 1907, the several institutions for the benefit of which these legacies were bequeathed have ceased to exist. First of all with regard to the will. The first three bequests I have already read. The actual bodies as regards rifles at Bournemouth and Weymouth respectively were companies of a battalion. The actual body of Volunteer Artillery at Bournemouth was a battery of a regiment of the Volunteer Garrison Artillery. With reference to these gifts I think they were meant to be gifts, not to the officer commanding the company or the battery, as the case might be, but to the officer commanding the Volunteer corps, of which that particular body which happened to be at Bournemouth or Weymouth formed part, as the case might be, and with regard to the artillery, the officer commanding the regiment of which

WARRINGTON J.
1909
DONALD, *In re.*
MOORE *v.* SOMERSET.

the battery in question formed part; and they were to be for the use of their respective corps, that is to say, for the corps commanded by the commanding officers who are referred to. Therefore the effect of those three bequests is a gift to each of the officers respectively commanding certain battalions of rifles and a certain regiment of artillery. No similar question arises with regard to other gifts; therefore I need not say anything more about them.

Now what has been the effect of the Territorial and Reserve Forces Act, 1907, and the Orders in Council made under it? The Act is entitled "An Act to provide for the reorganisation of His Majesty's military forces and for that purpose to authorise the establishment of County Associations, and the raising and maintenance of a Territorial Force, and for amending the Acts relating to the Reserve Forces." The Act then proceeds, in Part I., to provide for the establishment of county associations in the following terms:—"For the purposes of the reorganisation under this Act of His Majesty's military forces other than the regulars and their reserves, and of the administration of those forces when so reorganised, and for such other purposes as are mentioned in this Act, an association may be established for any county in the United Kingdom." Then follow provisions for the establishment of the county associations, and for their duties, and so on. Part II. contains provisions for the raising and maintenance of the Territorial Force, and provides (s. 6): "It shall be lawful for His Majesty to raise and maintain a force, to be called the 'Territorial Force,' consisting of such number of men as may from time to time be provided by Parliament." Then follow provisions as to the government, discipline, and pay of the members of the Territorial Force, their enlistment, service and discharge, and so on, and for their training, regulations which it is admitted are not the same regulations as those which applied to the old Volunteer force. Then come the following important provisions, in s. 29, with regard to the transfer of the Yeomanry and Volunteer forces to the Territorial Force: "(1.) Where an association has been established under this Act for any county His Majesty may by Order in Council transfer to the Territorial

Force such units of the Yeomanry and Volunteers or part thereof raised in the county as may be specified in the Order, and every such unit or part thereof shall from the date mentioned in the Order be deemed to have been lawfully formed under this part of this Act as an unit of the Territorial Force as provided by the Order, and the provisions of this part of this Act shall apply to it accordingly." Then there is this provision: "(2.) Every officer and man of an unit or part thereof mentioned in any such Order shall, from the date mentioned in that Order, be deemed to be an officer or man of the Territorial Force. Provided that nothing in this section or in any Order made thereunder shall, without his consent, affect the conditions or area of service of any person commissioned, enlisted, or enrolled before the passing of this Act." Then, with regard to what an Order in Council may do, sub-s. 3 provides: "An Order in Council under this section may provide"—(clause (*c*))—"for transferring to the association any property belonging to or held for the benefit of any such unit, so, however, that all property so transferred shall, as from the date of the transfer, be held by the association for the benefit in like manner of the corresponding unit"—i.e., the unit of Yeomanry or Volunteers which is by the Order in Council to be deemed to have been lawfully formed under the Act as an unit of the Territorial Force—"of the Territorial Force or for such other purposes as the association, with the consent of such corresponding unit, to be ascertained in the prescribed manner, shall direct." Then there are further provisions for referring questions to the Secretary of State with which I need not deal. So far for the Yeomanry and Volunteers.

The Act also provides for the Reserve Force, and in particular for the Special Reserve which now represents the Militia. In s. 34 of the Act this provision is made: "(1.) His Majesty may by Order in Council transfer to the Army Reserve such battalions of the Militia as may be specified in the Order, and every battalion so transferred shall from the date mentioned in the Order be deemed to have been lawfully formed under this part of this Act as a battalion of special reservists. (2.) As from the said date every officer of any battalion so transferred shall be deemed to be an officer in the reserve of officers, and every

WARRINGTON J.

1909

DONALD, *In re.* MOORE *v.* SOMERSET.

man in such battalion shall be deemed to be a special reservist," and so on. There is no provision made with regard to any property, because, I suppose, there was not in existence with regard to the Militia the same provision as to property vesting in the commanding officers as there was with regard to the Volunteers.

Under that Act an Order in Council was made on March 19, 1908, pursuant to s. 29, with reference to the Yeomanry and Volunteers. That Order in Council by clause 1 provided: "The several units (or parts of units) of Yeomanry and Volunteers detailed in the first column of the schedule appended hereto shall on and from the 1st April, 1908, be transferred to the Territorial Force, and shall thereafter be units of the Territorial Force, and shall be respectively known by the titles specified in the second column of the said schedule." That is, to take the case of the Volunteers, the units of Volunteers to be transferred to the Territorial Force shall be units of the Territorial Force, and shall be known by the titles specified in the second column of the schedule. By clause 5: "All property belonging to or held for the benefit of any unit of the Volunteers or Yeomanry mentioned in the first column of the schedule to this Order and vested in the commanding officer of any corps or regiment of Volunteers or Yeomanry as such shall, if and so far as it consists of land or any interest in land, by virtue of this Order become vested in, and, so far as it consists of other property, be transferred to, the association hereinafter mentioned, subject to any charges thereon and to any liabilities in or towards the discharge of which the property is properly applicable, and shall be held by that association for the benefit of the corresponding unit of the Territorial Force, in like manner in all respects as it was held by such commanding officer as aforesaid for the unit of the Volunteers or Yeomanry, or for such other purposes as the association, with the consent of such corresponding unit (to be ascertained in manner prescribed by regulations of the Army Council), shall direct. . . . ."

The several corps which are mentioned in the will and in the codicil were all transferred with special provisions, which, as to one of them, I will mention directly. With regard to the artillery, the Volunteer Artillery at Bournemouth, that is, that

battery of the regiment to which it at that time belonged, was a battery in fact of the 1st Dorsetshire Artillery Volunteers. The 1st Dorsetshire Volunteers became the 6th Hants Battery Royal Field Artillery, or rather it became a much larger unit. It became the Hants and Dorsetshire Royal Garrison Artillery, the Dorsetshire Battery Royal Field Artillery, and the 6th Hants Battery Royal Field Artillery, but the part of it which was represented by the Volunteer Artillery at Bournemouth is now called the 6th Hants Battery of the Royal Field Artillery. That is the important part of it. With regard to the Volunteer Rifles at Bournemouth, they were a company of the 4th Volunteer Battalion Hampshire Regiment, and that battalion became the 7th Battalion Hampshire Regiment. With regard to the Weymouth Volunteers, the battalion to which they belonged now becomes part of "C" Company of the 4th Battalion Dorsetshire Regiment.

I will now deal with the other corps which are mentioned in the codicil. The Dorsetshire Yeomanry Cavalry became a regiment of Imperial Yeomanry. The London Scottish became the 14th Battalion County of London (London Scottish). With regard to the 1st Battalion Lanarkshire Volunteers, their case was exceptional, because they had one company, "K," which was recruited from Glasgow University, and it was at one time thought likely that that particular company would be turned into an officers' training corps, and accordingly the Order in Council transferring that particular unit transferred the unit except the "K" Company. But I am told on authority that that "K" Company will shortly follow the path taken by the rest and be transferred to and become part of the Territorial Force.

Now have these several institutions ceased to exist? In my opinion the effect of the Territorial and Reserve Forces Act, 1907, and of the Order in Council of March 19, 1908, made under it, is not to destroy these units, but to reorganize them, and they are treated both in the Act and in the Order in Council as existing entities which are transferred to, and from henceforth become units of, the Territorial Force, and are called by different names; but, so far as the Act and the Order in Council are

WARRINGTON J.
1909
DONALD, *In re.* MOORE *v.* SOMERSET.

concerned, they continue to exist as institutions under those names. If this were not so, the provisions for the transfer of the property belonging to those institutions would seem to be most unjust; but if, on the other hand, the Act merely effects a reorganization of those bodies and subjects them to fresh regulations with the object of securing greater efficiency, then it is quite natural and proper that the property held by the commanding officer should in future be vested in the body which has the administration of the affairs of the units, and that is, I think, what has been done. As I have said, I think the effect of the Territorial and Reserve Forces Act, 1907, is not to destroy the institutions within the meaning of the testator's will, but to reorganize them, and, if so, it seems to me that the institutions (to use the expression which the testator has used) have not "ceased to exist," and that the shares of this accumulated fund are still payable to the proper person in respect of the institutions to which the legacies were originally given.

With regard to the Lanarkshire Volunteers I ought to refer specially to them. The Order in Council transfers the battalion except the "K" Company, and provides in clause 5 for the vesting in the county association of the property which was previously held by the commanding officer for the purposes of that battalion. It seems to me, therefore, that the battalion, as such, is now represented by the 5th Battalion Scottish Rifles notwithstanding the exception of "K" Company.

With regard to the persons to whom the money ought to be paid, I think there can be no question, as to the first three gifts in the will, that the shares which by the will are directed to be paid to the officers commanding those bodies ought to be paid to the county associations under clause 5 of the Order in Council of March 19, 1908. It is not contended with regard to the Lanarkshire Volunteers, or with regard to the Dorsetshire Yeomanry Cavalry, that that course ought not to be pursued. With regard to the London Scottish, the present commanding officer of that body has suggested that the money ought to be paid, not to the county association, but to him, by reason of the special provisions of the testator's will. The provision of the will is this, that the legacy is to be held by the commanding officer for any purpose

which he may think to be for the benefit of the respective corps, "it being my intention that the said sums shall be deemed private funds and be held and expended entirely independently of Government control." The argument is that inasmuch as these are to be private funds independent of Government control they cannot be paid to the county associations, because that would be subjecting them to public control. But it appears to me that these sums were given to the commanding officers for the benefit of their respective corps, and that if the Legislature interferes, as it has done, and directs that money which is to be paid to the commanding officers for the benefit of their corps shall now be paid to the county associations, I am bound to give effect to that direction. To say in the same breath that the money is for the benefit of the respective corps and yet is to be deemed to be private funds is inconsistent. The testator says that the payment is to be for the benefit of their respective corps. Whatever he may have meant by being "deemed to be private funds," it is quite plain that the commanding officer here could not have used the money for his own purposes. That being so, the Legislature has intervened and said that money which is held for the benefit of the corps is now to be paid to the county associations and to be applied by them for the benefit of the corps. It seems to me that in this case, too, the money ought to be paid to the county associations.

There only remains the bequest to the Militia. That was in these words: "To the officer commanding the Northamptonshire Militia for the mess of that regiment or for the poor of the regiment 100*l*." Now I think on the authority of *In re Good* (1) that that was a gift for charitable purposes within the Statute of Elizabeth, and that it comes within the last clause of the preamble of that statute—"The aid or ease of any poor inhabitants concerning payments of fifteens, setting out of soldiers and other taxes"—the reason being that in this case there is not the difficulty that there was in that case, inasmuch as there the legacy was given, not for the mess of the regiment generally, but for providing a library for the mess; and Farwell J. there said he felt more difficulty in applying the provisions of the Statute of

(1) [1905] 2 Ch. 60, 66.

WARRINGTON J. 1909 — DONALD for the Mess of SOMERSET

Elisabeth, because "there is no provision made in the Army Regulations for payment by the Government in aid of the library of the mess, although the Government does make allowances in aid of the supply of other things to the mess, such as hardware, furniture, and other appliances for the mess." Here the legacy is given for the mess generally, and therefore would be for the mess in aid of those purposes for which the Government does make a grant, and the difficulty referred to by Farwell J. does not arise in this case. Whether on that ground or on the ground that the legacy is given to the mess and that anything given to the mess is for the improvement of the efficiency of the army, and therefore charitable in that sense—I do not think it matters much which ground is resorted to—I think it is a charitable bequest. If so, then the proper mode of dealing with that legacy would be to give it to the person who would be administering the charity for the time being, and that person would be the officer who at the time the money has to be paid would be the officer commanding that unit of the Army Reserve which now represents the Northamptonshire Militia. There is no question of payment to a county association in that case, because the county association has nothing to do with it. The transfer of the Militia units was effected by another order of April 9, 1908, and I think this Northamptonshire Militia became a unit of the Special Reserve or the Army Reserve, whichever is the proper name of it, and became, as from that date, the 3rd Battalion Northamptonshire Regiment, and therefore I hold that the legacy ought to be paid to the officer commanding that regiment.

Solicitors: *Wilde, Moore, Wigston & Co.*; *Treasury Solicitor*; *A. E. & H. Slade*; *Lovell, Son & Pinfold*; *Bray & Cartwright*; *Williams & James*; *Howes, Pattisson & Rothwell*; *Trinder, Capron & Co.*

W. I. C.

WARRINGTON J.
1909
July 15.

In re J. DEFRIES & SONS, LIMITED.
EICHHOLZ *v.* J. DEFRIES & SONS, LIMITED.

[1909 J. 485.]

Company—Debentures—Settlement of—Trustees registered Holders—Interest—Cheques for, sent to Trustees or by their Direction to Tenant for Life—Indorsement by Trustees—Negotiation—Non-presentation of Cheques for Payment—Claim for Interest by Trustees as registered Holders.

Under a settlement trustees held certain debentures in a company in respect of which they were registered as holders upon trust for D. for life and after her death for her children. Cheques for the interest on the debentures for the time being standing in the names of the trustees were drawn by the company sometimes in favour of S., a former trustee, and sometimes in favour of D., as the interest became due. In the former case the cheques were indorsed by S. to D., and in the latter case they were sent by the company direct to her. The amount represented by the cheques was 1793*l.* 15*s.*, which included an amount for interest on 3000*l.* debentures, the principal money secured by which had been paid off. At the request of her son, who was the managing director of the company, D. had abstained from presenting the cheques for payment, and the interest on the debentures had not in fact been paid. A debenture-holders' action had been commenced against the company (which was now in liquidation), and the usual order for accounts and inquiries had been made. On taking the accounts the present trustees of the settlement claimed to rank by virtue of their debentures for the aggregate amount of the interest represented by the cheques:—

Held, that the mere giving of a cheque was not conditional payment of a secured debt so as to release the security.

Dictum of Farwell L.J. in *Henderson* v. *Arthur*, [1907] 1 K. B. 10, 13, followed.

Held, also, that the indorsement of the cheques by S. did not preclude the claimants from relying on their security.

Bunney v. *Poyntz*, (1833) 4 B. & Ad. 568, is inconsistent with, if not expressly overruled by, *Gunn* v. *Bolckow, Vaughan & Co.*, (1875) L. R. 10 Ch. 491.

Held, therefore, that the trustees were entitled to rank as secured creditors for the amount of the interest represented by the cheques.

ADJOURNED SUMMONS.

J. Defries & Sons, Limited, was incorporated on November 18, 1893, to acquire the business formerly carried on by J. Defries, and in the same year issued a series of first mortgage debentures

WARRINGTON J.

1909

J. DEFRIES & SONS, LIMITED, *In re.*

EICHHOLZ *v.* J. DEFRIES & SONS, LIMITED.

to a total amount of 15,000*l.* The debentures were for 100*l.* each, and were all in the same form, and by them the company agreed to pay to the registered holders thereof the principal sums secured on a named future date and in the meantime interest at 5 per cent. per annum; and the company charged all its undertaking and property with these payments as a floating security.

In 1909 the present action was commenced by the plaintiff on behalf of himself and all the other debenture-holders to realize his security, and an order had been made directing the usual accounts and inquiries in a debenture-holders' action.

On taking the accounts in chambers H. M. Adler and J. Hands, as registered holders of seventy of the first mortgage debentures, claimed to rank by virtue thereof for the sum of 1793*l.* 15*s.* for interest due and payable on such debentures (and on thirty other debentures which had been paid off), and the present summons was taken out by the plaintiff for the determination of the question whether they were so entitled to rank for that sum or for any and what part thereof.

The claim was made under the following circumstances: H. M. Adler and J. Hands were the present trustees of a settlement in which the debentures were comprised, having been appointed trustees on November 15, 1907, prior to which date A. E. Sydney was one of the trustees. Under the settlement Mrs. Susan Defries was tenant for life. The arrears of interest claimed were the aggregate amount of six half-yearly dividends, due from time to time on the debentures, comprised in the settlement, between July 15, 1904, and January 15, 1909, with the exception of one half-year's interest which was paid on April 2, 1908. Three of the items represented interest due on 10,000*l.* debentures; the remaining three were in respect of a sum of 7000*l.* debentures, 3000*l.* having been paid off between March 5, 1907, and August 15, 1907. The company, as interest had from time to time become due, had drawn cheques, six in number, making up the amount of the arrears now claimed. Three of those cheques had been made payable to Sydney and had been indorsed over by him to Mrs. Defries as the tenant for life, and three had been given direct, at his request or with his consent, to Mrs. Defries. Mrs. Defries' family were much

interested in the business, and she herself was a member of the company, and at the request of her son, who was the managing director, she had refrained from cashing the cheques, and the interest on the debentures had not been paid.

The company was now in liquidation.

E. E. H. Brydges, for the plaintiff, as representing the debenture-holders other than the claimants.

The claimants are not entitled to any of the interest claimed. As to the cheques made payable to Sydney, they were indorsed by him "without recourse" and handed to Mrs. Defries. This converted a conditional payment into an absolute payment. Mrs. Defries could not have sued Sydney on the cheques. If a vendor takes a promissory note for the price of goods sold and negotiates it, and the note is outstanding in the hands of the indorsee, that is tantamount to payment, and his vendor's lien is gone: *Bunney* v. *Poyntz*. (1)

The point here is not whether the money represented by the cheques can be recovered from the company, but whether it is due to the claimants as debenture-holders under and by virtue of their security or to Mrs. Defries on the cheques. It is submitted that the debt to the claimants is gone.

[WARRINGTON J. In *Bunney* v. *Poyntz* (1) the cheque had been parted with to a bona fide holder for value.

H. Terrell, K.C. That case has been overruled by *Gunn* v. *Bolckow, Vaughan & Co.* (2) Moreover, this is a specialty debt, and the right of the creditor cannot be affected by his taking a cheque for it: *Henderson* v. *Arthur*. (3)]

What Farwell L.J. said in *Henderson* v. *Arthur* (3) is not in accordance with *Palmer* v. *Bramley*. (4) In that case it was held that the fact of a landlord taking a bill of exchange from his tenant for rent due is some evidence of an agreement by the landlord to suspend his remedy by distress during the currency of the bill.

[WARRINGTON J. That is not very satisfactory. It is some evidence of an agreement.]

(1) 4 B. & Ad. 568.
(2) L. R. 10 Ch. 491.
(3) [1907] 1 K. B. 10, 13.
(4) [1895] 2 Q. B. 405.

WARRINGTON J.
1909
J. DEFRIES & SONS, LIMITED, *In re.*
EICHHOLZ *v.*
J. DEFRIES & SONS, LIMITED.

The same reasoning applies with regard to the cheques which were sent by the company direct to Mrs. Defries. The company is now liable on them, not to the claimants, but to a third party.

Then it is a question whether the arrangement between Mrs. Defries and the managing director of the company did not amount to a relending by her to the company.

[WARRINGTON J. I do not see what evidence there is of any arrangement by Mrs. Defries to look to the company personally instead of her security. Where is there any consideration for her so doing?]

I cannot say there was any consideration moving from the company to her.

The third point is whether Mrs. Defries has not, by her laches in not presenting the cheques for payment, brought about a state of things by which the interests of the other debenture-holders have been prejudiced. The money which would have been spent in paying the cheques has probably been spent in paying the unsecured creditors.

G. F. Hart, for the liquidator, as representing the unsecured creditors. I adopt the same argument and submit (1.) that all the sums represented by the cheques have ceased to be a charge on the debenture assets; (2.) that, at any rate, those represented by the cheques indorsed by Sydney have ceased to be a charge; (3.) that interest on the 3000*l.* debentures ceased to be a charge when those debentures were paid off; and (4.) that all sums payable before April 2, when Mrs. Defries cashed a cheque for interest due on January 15, 1908, have been released.

The question whether the acceptance of a negotiable instrument releases the security for the debt is one of intention. Here the claimants have elected to take cheques for their debt, and there was in all cases a severance or splitting up of their interest. A mortgagee cannot split up his position so as to remain himself a mortgagee for the principal debt and substitute other persons as mortgagees for the interest upon the debt. The money represented by the cheques cannot be said to be any longer due under or by virtue of the debentures. Then as to re-borrowing by the company. It is not necessary that there should be further

consideration given by the company. It is sufficient if the transaction is a loan. If there was a re-borrowing the transaction was void for want of registration under the Companies Acts, 1900 and 1907.

[WARRINGTON J. A man does not lose his security because he forbears to enforce payment of the interest on the debt secured.]

The question is whether there has not been here an election to take negotiable instruments instead of the charge.

As to the cheques representing interest on the 3000*l.* debentures which were paid off, the amount is not due under or by virtue of debentures now held by the claimants.

[*Terrell, K.C.* I admit that if those debentures were handed back to the company on payment off, the charge in respect of interest has gone.]

Terrell, K.C., and *J. D. Israel*, for the claimants, were not called upon.

WARRINGTON J. This is a debenture-holders' action, and the usual accounts have been directed of what is due to the debenture-holders under and by virtue of their security. The debentures are registered debentures, and the principal money is payable to the registered holders. Among the registered holders are H. M. Adler and J. Hands. Arrears of interest are unpaid in respect of debentures now held by them and also in respect of debentures for 3000*l.* previously held by them or their predecessors. The question is whether they are now entitled by virtue of their security to those arrears of interest amounting to 1793*l.* 15*s.*, or to any and what part of those arrears.

The facts are these: [His Lordship stated them, and continued.] It was contended, first, on behalf of the plaintiff, as representing the other debenture-holders, and secondly by the liquidator on behalf of the simple contract creditors, that the effect of the transaction was that the registered holders had released their security and that Mrs. Defries, the holder of the cheques, although entitled as a simple contract creditor to sue upon the cheques and to rank with the other simple contract creditors, was not entitled to be regarded as a secured creditor or

WARRINGTON J.
1909
J. DEFRIES & SONS, LIMITED, *In re.*
EICHHOLZ v. J. DEFRIES & SONS, LIMITED.

The same reasoning applies with regard to the cheques which were sent by the company direct to Mrs. Defries. The company is now liable on them, not to the claimants, but to a third party.

Then it is a question whether the arrangement between Mrs. Defries and the managing director of the company did not amount to a relending by her to the company.

[WARRINGTON J. I do not see what evidence there is of any arrangement by Mrs. Defries to look to the company personally instead of her security. Where is there any consideration for her so doing?]

I cannot say there was any consideration moving from the company to her.

The third point is whether Mrs. Defries has not, by her laches in not presenting the cheques for payment, brought about a state of things by which the interests of the other debenture-holders have been prejudiced. The money which would have been spent in paying the cheques has probably been spent in paying the unsecured creditors.

G. F. Hart, for the liquidator, as representing the unsecured creditors. I adopt the same argument and submit (1.) that all the sums represented by the cheques have ceased to be a charge on the debenture assets; (2.) that, at any rate, those represented by the cheques indorsed by Sydney have ceased to be a charge; (3.) that interest on the 3000*l.* debentures ceased to be a charge when those debentures were paid off; and (4.) that all sums payable before April 2, when Mrs. Defries cashed a cheque for interest due on January 15, 1908, have been released.

The question whether the acceptance of a negotiable instrument releases the security for the debt is one of intention. Here the claimants have elected to take cheques for their debt, and there was in all cases a severance or splitting up of their interest. A mortgagee cannot split up his position so as to remain himself a mortgagee for the principal debt and substitute other persons as mortgagees for the interest upon the debt. The money represented by the cheques cannot be said to be any longer due under or by virtue of the debentures. Then as to re-borrowing by the company. It is not necessary that there should be further

consideration given by the company. It is sufficient if the transaction is a loan. If there was a re-borrowing the transaction was void for want of registration under the Companies Acts, 1900 and 1907.

[WARRINGTON J. A man does not lose his security because he forbears to enforce payment of the interest on the debt secured.]

The question is whether there has not been here an election to take negotiable instruments instead of the charge.

As to the cheques representing interest on the 3000*l.* debentures which were paid off, the amount is not due under or by virtue of debentures now held by the claimants.

[*Terrell, K.C.* I admit that if those debentures were handed back to the company on payment off, the charge in respect of interest has gone.]

Terrell, K.C., and *J. D. Israel*, for the claimants, were not called upon.

WARRINGTON J. This is a debenture-holders' action, and the usual accounts have been directed of what is due to the debenture-holders under and by virtue of their security. The debentures are registered debentures, and the principal money is payable to the registered holders. Among the registered holders are H. M. Adler and J. Hands. Arrears of interest are unpaid in respect of debentures now held by them and also in respect of debentures for 3000*l.* previously held by them or their predecessors. The question is whether they are now entitled by virtue of their security to those arrears of interest amounting to 1793*l.* 15*s.*, or to any and what part of those arrears.

The facts are these: [His Lordship stated them, and continued.] It was contended, first, on behalf of the plaintiff, as representing the other debenture-holders, and secondly by the liquidator on behalf of the simple contract creditors, that the effect of the transaction was that the registered holders had released their security and that Mrs. Defries, the holder of the cheques, although entitled as a simple contract creditor to sue upon the cheques and to rank with the other simple contract creditors, was not entitled to be regarded as a secured creditor or

WARRINGTON J.
1909
J. DEFRIES & SONS, LIMITED, *In re.*
EICHHOLZ *v.* J. DEFRIES & SONS, LIMITED.

agreed to abstain from presenting the cheques, and that that amounted to an agreement by her to give up her security and to re-lend the money represented by them to the company; but there is no evidence to support that suggestion.

There remain two other small matters to dispose of. The claimants' debenture debt was reduced from 10,000*l.* to 7000*l.* by the payment off by the company of 3000*l.* It is admitted on behalf of the claimants that if on the 3000*l.* being paid off the then registered holders handed back to the company the debentures for that amount, the claimants would not be able to rely on those debentures as creating a charge for the interest on them. That, however, is a matter which must be referred back to chambers for further investigation. I see no grounds for holding that the earlier claims for interest have been discharged.

On the further point taken on behalf of the simple contract creditors, that on April 2, 1908, Mrs. Defries cashed a cheque for 175*l.* for interest due on January 15, 1908, and that that was sufficient to release the other cheques, it seems to me that that contention cannot be sustained. I think the reason why Mrs. Defries cashed the cheque was probably because she wanted the money.

I therefore declare that the claimants Adler and Hands are entitled to rank by virtue of their debentures for the interest due and unpaid from July 15, 1904, to January 15, 1909, they submitting not to claim arrears in respect of any debentures which have been delivered up to be cancelled.

Solicitors: *John Hands; W. B. Styer; Rubinstein, Myers & Co.*

W. I. C.

Applied. Re SELBY-WALKER (*decd.*). [1949] 2 All E.R. 178.

WARRINGTON J.

1909

July 15.

In re CHURCHILL, HISCOCK *v.* LODDER.

[1909 C. 687.]

Will—Construction—Legacy—Interest—Legacy payable at twenty-one—Power to Trustees to apply Legacy in or towards Benefit of Legatee whether under age of twenty-one or not—General Intention to provide Maintenance.

Testatrix by her will devised and bequeathed the residue of her real and personal estate to trustees upon trust to sell and convert and out of the proceeds to pay certain pecuniary legacies, including a legacy of 200*l.* to her grand-nephew C. P., and she directed that the interest of males under her will should vest at twenty-one years and of females at that age or marriage. The testatrix empowered her trustees at their discretion "to apply the whole or any part of the share to which any beneficiary hereunder may be contingently entitled in or towards the advancement in life or otherwise for the benefit of such beneficiary whether male or female and whether under the age of twenty-one years or not." The testatrix died in 1908. At the date of her will and the date of her death C. P. was an infant:—

Held, that interest was payable on the legacy from the death of the testatrix and that the trustees were entitled to apply the interest in or towards the maintenance of C. P. during his infancy.

Pett v. *Fellows*, (1733) 1 Swans. 561, n., as explained by Sugden L.C. in *Leslie* v. *Leslie*, (1835) Ll. & G. t. Sugden, 1, 3, followed.

ORIGINATING SUMMONS.

Louisa Churchill by her will dated December 17, 1900, after appointing executors and trustees thereof and giving certain pecuniary legacies, devised and bequeathed all her real and personal estate to her trustees upon trust to sell and convert and out of the moneys to arise from such sale and conversion to pay her funeral and testamentary expenses and debts and the legacies thereinbefore bequeathed and to stand possessed of the residue of the said moneys (thereinafter called "my residue") "as to 3000*l.* (part of my residue) upon trust to pay thereout the following legacies viz.: . . . . to my grand-nephew Charles Plaskett of Bournemouth (the son of my late nephew Charles Plaskett) 200*l.*" The testatrix then gave further sums out of the 3000*l.* to other persons and directed her trustees to divide the remainder of the 3000*l.* in equal shares to and amongst her

WARRINGTON J.
1909
CHURCHILL, *In re.* HISCOCK *v.* LODDER.

grand-niece Mary Plaskett and her nephews James Plaskett, William Plaskett, and Mark Plaskett. She then proceeded as follows: "And I direct that the interest of males under this my will shall vest at twenty-one years and of females at that age or marriage. And I empower the trustees at their discretion to apply the whole or any part of the share to which any beneficiary hereunder may be contingently entitled in or towards the advancement in life or otherwise for the benefit of such beneficiary whether male or female and whether under the age of twenty-one years or not."

The testatrix died on May 6, 1908.

The testatrix's grand-nephew Charles Plaskett was born on December 20, 1892, and therefore at the date of the will and the death of the testatrix was an infant.

The present summons was taken out by the executors and trustees for the determination of the questions (inter alia) whether interest was payable on the legacy of 200*l.* bequeathed to Charles Plaskett from the death of the testatrix, and, if so, whether the trustees were at liberty to pay the interest to Jane Plaskett, his mother, for his maintenance during infancy.

A. àBeckett Terrell, for the summons.

J. F. Carr, for the infant legatee. It is admitted that there is no evidence that the testatrix stood in loco parentis to the infant legatee, but where a general intention to maintain is expressed by the will, interest from the death of the testator will be allowed even if the testator does not stand in loco parentis: *Pett* v. *Fellows* (1); *Lambert* v. *Parker* (2); *Leslie* v. *Leslie* (3); *In re Crane* (4); Theobald on Wills, 7th ed. p. 191. I rely on *Leslie* v. *Leslie* (3) as a comment on *Pett* v. *Fellows* (1) rather than as an authority on the present point. In this will it is submitted that a general intention to maintain is to be found in the clause authorizing the application by the trustees of the legacies for "the advancement in life or otherwise for the benefit of" the legatees.

C. V. Rawlence, for the residuary legatees. Interest is not, it

(1) 1 Swans. 561, n.
(2) (1815) G. Coop. 143.
(3) Ll. & G. t. Sugden, 1.
(4) [1908] 1 Ch. 379, 381.

is submitted, payable on the legacy. In the case of a legacy to a stranger, as here, the general rule is that, in the absence of a general intention to provide maintenance, interest only runs from the time when the legacy is payable. Here the testatrix has shewn no general intention to maintain as distinguished from an intention to advance. An advancement clause "does not," as was said by Kekewich J. in *In re Moody* (1), "touch the question of income." That remark is directly in point here.

WARRINGTON J. stated the facts and continued:—In the first place it is clear that the legacy in question does not vest or at all events become payable until the legatee attains the age of twenty-one years, and prima facie, therefore, it would not bear interest except from the time when he attains that age, and I think that would be the result notwithstanding that it is payable, not out of the general residue, but out of a sum of 3000*l.* which is part of that general residue. But it is contended on behalf of the infant legatee that the general rule that a legatee is not entitled to interest until the legacy is payable is subject to certain exceptions; for example, in the case of a legacy to an infant where the testator stands in loco parentis, there, although the legacy is not payable until the infant attains twenty-one years, he is entitled to be paid interest upon it from the testator's death. There is a further exception where the testator has shewn an intention that the legatee should be maintained as part of the testator's bounty; in such a case the legacy will bear interest from the testator's death until the legacy becomes payable. It is said that the present case comes within that exception. That the exception exists is shewn by *Leslie* v. *Leslie*. (2) There the testator had shewn twice over his intention that the 2400*l.* given by his will should be "for the use and support of the younger children." He said so in the recital, and he used those words again in the actual gift. So that case is, I think, an illustration of the second exception to the general rule. In the present case what I have to determine is whether in the will before me there is sufficient to bring the matter within that exception. Has the testatrix expressed an intention

(1) [1895] 1 Ch. 101, 104. (2) Ll. & G. t. Sugden, 1.

WARRINGTON J.
1909
CHURCHILL, *In re.* HISCOCK *v.* LODDER.

that the infant legatee shall be maintained out of her bounty? In support of the contention that she has done so counsel for the infant legatee relies on the direction in the will empowering the trustees "to apply the whole or any part of the share to which any beneficiary hereunder may be contingently entitled in or towards the advancement in life or otherwise for the benefit of such beneficiary whether male or female and whether under the age of twenty-one years or not." If the direction had been "towards the advancement in life" of the legatee only, that would clearly not have been sufficient; but the testatrix goes on to say "or otherwise for the benefit of such beneficiary whether male or female and whether under the age of twenty-one years or not"—that is, for maintenance as distinguished from advancement. Here, therefore, the legacy is payable at twenty-one, but power is given to the trustees to apply the legacy for maintenance of the infant. Is that sufficient to justify the Court in holding that the legacy bears interest from the death of the testatrix until the date at which it becomes payable? In support of the contention that it is sufficient two cases were relied upon; one was a case in which the decision appears to be in point, but not the reasoning; the other one in which the reasoning is in point, but not the decision. The first is *Pett* v. *Fellows* (1), before Talbot L.C., in 1733. I thought at first from the words "in Canc.," with which the report is headed, that it was heard in chambers, but I think these words only mean that it was heard in Chancery. The report is not a very satisfactory one. The marginal note is as follows: "Legacies to infants payable at twenty-one, with benefit of survivorship in the event of death under that age, and a power to the executors to apply any part of the legacies towards the maintenance of the legatees, bear interest from the death of the testatrix; the infants being her cousins and destitute of other provision." There the testatrix bequeathed to her cousin Phineas Pett, the sum of 100*l.*, to her cousin Peter Pett, 200*l.*, to her cousin Elizabeth Pett, 1000*l.*; "in case any of the aforesaid three children, Phineas, Peter, or Elizabeth, shall die before the age of twenty-one, my intention being that their legacies shall be paid when they respectively attain those years, his or her

(1) 1 Swans. 561, n.

legacy shall be equally divided between the survivors; and in case two of them shall die before the age of twenty-one, then the whole shall go to the survivor." Then came this power: "I also give a power to my executors to apply any part of the aforesaid legacies "—that is the corpus—" towards the maintenance or education of the aforesaid three children, during their minority, as in their discretion they shall think fit." The question arising on that will was whether the legacies should carry interest, and, if so, from what time. The Lord Chancellor says: "It plainly appears that the testatrix intended these legacies should carry interest, and that she made them payable at twenty-one years of age, for no other reason than that if one of them died, his legacy might go to the survivors. It is a general rule, that legacies do not of their own nature carry interest till default is made in payment; if of an indefinite legacy, from a year after the death of the testator; if made payable at a future day, then to carry interest from such time of payment: but this is in case of strangers only; for in case of a child unprovided for, the legacy shall carry interest from the death of the father or mother who gave it. In the present case, the legatees are called cousins, and it is admitted in the answer that they had no other subsistence. Therefore decreed that the executors should be accountable for interest, from the death of the testatrix." I do not know why it was not there suggested that the testatrix was not in loco parentis. That decision seems to me to be in point because the legacies there were payable at a future time, and there was a direction, or rather a power, to the trustees to apply the legacies themselves for the maintenance of the infants. But, curiously enough, the Lord Chancellor does not in terms appear to have relied on the existence of that power as enabling him to come to the decision at which he arrived, but on the fact that the legatees were called cousins of the testatrix and that they had no other subsistence. But I think the real reason for the decision is supplied by Sugden L.C. in *Leslie* v. *Leslie*. (1) The facts of that case have no bearing on the present, except as illustrating the application of the same principle. The Lord Chancellor says (2): "The only question for me to decide is, whether or no the 2400*l.*

(1) Ll. & G. t. Sugden, 1. (2) Ll. & G. t. Sugden, 3.

WARRINGTON J.
1909
CHURCHILL, *In re.* HISCOCK *v.* LODDER.

carries interest. The case of *Pett* v. *Fellows* (1), which has been cited, was properly decided in consequence of this clause. 'I also give a power to my executors to apply any part of the aforesaid legacies towards the maintenance or education of the aforesaid three children, during their minority, as in their discretion they shall think fit'; but for that clause the interest could not have been given." So Sugden L.C. clearly regarded the clause for maintenance as justifying that decision, which could not otherwise have been justified. It seems to me, therefore, that those two cases, taken together, are sufficient to justify me in this case in holding that the trustees are empowered to apply the legacy for the maintenance of the infant legatee. I hold, therefore, that interest is payable on the legacy from the death of the testatrix, and that the trustees are entitled to apply that interest for the maintenance of the infant legatee.

Solicitors for all parties: *Light & Fulton, for Hamilton Fulton, Salisbury.*

(1) 1 Swans. 561, n.

W. I. C.

WARRINGTON J.
1909
July 16.

In re PARBOLA, LIMITED.
BLACKBURN *v.* PARBOLA, LIMITED.

[1909 P. 236.]

Mortgagor and Mortgagee—Practice—Foreclosure Order nisi—Creditor who has obtained equitable Execution—Application to be added as Defendant and for Extension of Time for Redemption—Costs—Form of Order.

Where in a foreclosure action a mortgagee had obtained a foreclosure order nisi, and subsequently a judgment creditor in another action, who had obtained the appointment of a receiver by way of equitable execution of the property of the mortgagor, applied to be added as a defendant to the foreclosure action, and that the period for redemption might be extended, the Court made an order adding the applicant as defendant, but refused to extend the period for redemption.

Order in *Campbell* v. *Holyland*, (1877) 7 Ch. D. 166, 168, followed.

Motion.

Parbola, Limited, was incorporated under the Companies Acts, 1862 to 1900, in September, 1906.

By an indenture dated October 6, 1906, the company conveyed certain freehold and leasehold hereditaments in the parish of Gwinear, in the county of Cornwall, to the plaintiff by way of mortgage to secure the repayment of 20,000*l.* and interest. And the company thereby charged its undertaking and all other its property, both present and future (including its uncalled capital), with the payment of the principal sum and interest, and such charge was, save as regards the freehold and leasehold hereditaments, to be a floating charge, but so that the company should not be at liberty to create and should not create any mortgage or charge thereon ranking, or which might be made to rank, in priority to or pari passu with the charge thereby secured.

On the same day the mortgage was duly registered pursuant to s. 14 of the Companies Act, 1900.

On February 3, 1909, the plaintiff issued his writ in the present action to realize his security.

On February 12, 1909, an order was made for an account of what was due to the plaintiff under his mortgage, and it was ordered that the plaintiff be at liberty to enforce the security therein comprised by foreclosure or sale as he might be advised,

WARRINGTON J.

1909

PARBOLA, LIMITED, *In re.*

BLACKBURN *v.* PARBOLA, LIMITED.

and that J. W. Daw be appointed receiver and manager of the business and undertaking of the company.

On March 4, 1909, the Master made his certificate whereby he certified that there was then due to the plaintiff under his mortgage the sum of 21,336*l.* 15*s.* 3*d.* for principal and interest.

On March 16, 1909, the usual foreclosure order nisi was made, and the company was thereby given until September 16, 1909, to pay the said sum of 21,336*l.* 15*s.* 3*d.* and a further sum of 607*l.* 9*s.* 7*d.* which would then be due to the plaintiff for interest, and in default was to be foreclosed of all right, interest, and equity of redemption in the mortgaged premises.

On April 28, 1909, C. D. Taylor recovered judgment against the company in an action in the King's Bench Division for 3956*l.* 16*s.* 4*d.*, and on May 21, 1909, he obtained in that action the appointment of a receiver by way of equitable execution of the property and assets of the company comprised in the plaintiff's security, but subject to the rights of any prior incumbrancers.

Taylor now applied by motion for an order that he might be added as a defendant in the present action, and that the order of March 16, 1909, might be varied or added to by limiting a time within which he might redeem.

D. M. Kerly, for the motion. I ask for an order adding the applicant as a defendant to the action in similar terms to that made in *Campbell* v. *Holyland*. (1) The applicant being a judgment creditor has an interest in the equity of redemption: *Ex parte Evans*. (2) As was said by Lindley L.J. in *Moser* v. *Marsden* (3), a person not before the Court "may well say 'I am not to be deprived of my property in my absence.'" I admit that it is entirely within the discretion of the Court whether or not it will extend the period fixed for redemption. It would be a great hardship on the applicant if he were required to redeem at such an early date as September 16.

Rowden, K.C., and *Owen Thompson*, for the plaintiff. We have no objection to the applicant being added as a defendant

(1) 7 Ch. D. 166, 168. (2) (1879) 13 Ch. D. 252.
(3) [1892] 1 Ch. 487, 490.

to the action, but he must take it as he finds it: *Bishop of Winchester* v. *Paine*. (1) He is not, therefore, entitled to have the period fixed for redemption extended. Further, the applicant comes to the Court to obtain an order for his own protection, and has only partially succeeded. He ought, therefore, to pay the plaintiff's costs of the motion in any event.

WARRINGTON J. stated the facts, and continued:—I think, on the authority of *Campbell* v. *Holyland* (2), it would be right to add the applicant as a defendant to the action, he being pro tanto an assignee of the equity of redemption; but he must be content to take his interest in the equity of redemption in the state in which he finds it, namely, as bound by the order of March 16, 1909, and he must redeem on September 16, 1909. It was contended on his behalf that he ought to be allowed a further time to redeem, but to make such an order would be entirely contrary to the practice of the Court. I think the proper order to make is that which was made in *Campbell* v. *Holyland* (2), namely, that the applicant be added as a defendant to the action, and that the proceedings in the action be carried on between the plaintiff and the original defendant and such new defendant as if he had been originally a defendant. With regard to the costs, the applicant comes in here for his own protection and asks for an order for his own advantage. In this he is only partially successful, and it is stated that the security is insufficient, and I think, therefore, he ought to pay the plaintiff's costs of this motion in any event.

The order as passed and entered (so far as material) was as follows:—

"This Court doth order that the said C. D. Taylor be added as a defendant in this action and It is ordered that proceedings in this action be carried on and prosecuted by the plaintiff against the defendants and against the said C. D. Taylor and It is ordered that the said C. D. Taylor pay to the plaintiff his costs of the said motion to be taxed by the taxing Master."

Solicitors: *Kerly & Sons; Merrimans & Thirlby.*

(1) (1805) 11 Ves. 194.

(2) 7 Ch. D. 166, 168.

W. I. C.

PARKER J.

1909

June 9, 10, 11, 14, 15, 16, 17, 18; *July* 9.

JAMES JONES & SONS, LIMITED *v.* EARL OF TANKERVILLE.

[1908 J. 2201.]

Specific Performance—Injunction—Contract for purchase of Timber to be cut and removed by Purchaser—Mutuality—Licence—Revocation.

The plaintiffs entered into a contract with the defendant for the purchase of certain timber growing on his property. By the contract they were to have the right to enter upon the property, cut the timber, and saw it up thereon, to erect sawmills, and to remove the timber; and the defendant was to give free exit for all timber to hard roads and free sites for sawmills. The plaintiffs erected a sawmill and commenced to cut timber, saw it up, and remove it. The defendant subsequently repudiated the contract and forcibly ousted the plaintiffs and their men from the estate. The plaintiffs brought this action against the defendant, asking for an injunction restraining him from preventing the due execution of the contract, and for damages. The defendant contended, inter alia, that the claim for an injunction was equivalent to a claim for specific performance, and that the Court would not grant specific performance of such a contract, but would leave the plaintiffs to their remedy by way of damages:—

Held, that although the Court might be unable to compel the plaintiffs to cut the timber if they refused to do so, it had jurisdiction to give them relief by way of specific performance, and that the injunction ought to be granted.

The plaintiffs, James Jones & Sons, Limited, were a company carrying on business as timber merchants. In October, 1907, they entered into a contract in writing contained in letters and memoranda with the defendant, the Earl of Tankerville, for the purchase of timber growing on the Chillingham estates. By this contract the plaintiffs were to have the right to enter upon the estates and cut the timber and saw it up thereon, and for that purpose to erect sawmills and to remove the timber from the estates; the plaintiffs were to pay 1565*l.* for the timber, and the defendant was to give free exit to hard roads for all timber and free sites for sawmills. The plaintiffs thereupon erected a sawmill and commenced to cut timber, saw it up at the mill, and remove it.

In February, 1908, a second contract was entered into whereby the plaintiffs were to pay 4310*l.* for further timber on the estates

on similar terms. They accordingly entered and erected sawmills and machinery, and proceeded to fell timber and saw it up and carry it away. In September, 1908, Lord Tankerville repudiated the contracts and demanded that further cutting should cease, and on October 27, 1908, he forcibly ousted the plaintiffs and their men from the Chillingham estates, wrecked their sawmills, and upset their machinery, buildings, and stacks of timber.

The plaintiffs brought this action against him, asking for injunctions restraining him from preventing the due execution of the contracts, and for damages. The defendant raised many defences, but the only question that calls for a report was his contention that the plaintiffs' claim for injunctions was equivalent to a claim for specific performance, and that the Court would not grant specific performance of such contracts, but would leave the plaintiffs to their remedy by way of damages only.

Buckmaster, K.C., and *Schiller*, for the plaintiffs.

Romer, K.C., *Sheldon*, and *H. S. Mundahl*, for the defendant, after arguing that a fiduciary relationship existed between the plaintiffs and the defendant, that the plaintiffs failed to perform their duty to him, and that they could not insist upon carrying out the contract, continued:—The injunctions asked for by the plaintiffs are equivalent to a decree for specific performance; but the Court will not compel specific performance of the contract unless it can execute the whole contract on both sides: *Gervais* v. *Edwards*. (1) A contract to be specifically performed by the Court must be mutual; it must be such that it might at the time when it was entered into have been enforced by either of the parties against the other of them. The Court cannot as against the plaintiffs decree specific performance of these contracts to cut timber; therefore it will not order us to perform our part of the contracts. No property in the growing timber passed to the plaintiffs.

[PARKER J. referred to *Wood* v. *Leadbitter*. (2)]

A licence to enter on real estate passes no interest and transfers no property—*Thomas* v. *Sorrell* (3)—and it can be revoked. The

(1) (1842) 2 D. & War. 80. (2) (1845) 13 M. & W. 838.
(3) (1671) Vaugh. 330, 351.

PARKER J. 1909

JAMES JONES & SONS, LIMITED v. TANKERVILLE (EARL).

contracts are not under seal, and the plaintiffs have no legal rights which the Court will enforce by way of specific performance.

Buckmaster, K.C., in reply. There is no longer any magic in documents under seal. Since the decision in *Walsh* v. *Lonsdale* (1) the Court will enforce an equitable right. This question is of no importance now, for under the Sale of Goods Act, 1893, the Court can decree specific performance of an agreement to buy a chattel. A right to cut and carry away timber is in the nature of a profit à prendre and can be specifically enforced.

Cur. adv. vult.

July 9. PARKER J. read a judgment in which, after holding that no fiduciary relationship existed between the plaintiffs and the defendant, his Lordship said: It remains to be considered what relief the plaintiffs are entitled to. They ask for injunctions restraining the defendant from preventing the due execution of the contracts, as well as for damages. It was argued that this is a claim for specific performance, and that the contracts are such that the Court cannot or, at any rate, will not grant specific performance, but will leave the plaintiffs to their remedy by way of damages only. It is said that in contracts of this sort there is a want of mutuality which precludes the remedy by way of specific performance. A contract for the sale of specific timber growing on the vendor's property, on the terms that such timber is cut and carried away by the purchaser, certainly confers on the purchaser a licence to enter and cut the timber sold, and, at any rate as soon as the purchaser has severed the timber, the legal property in the severed trees vests in him. A licence to enter a man's property is prima facie revocable, but is irrevocable even at law if coupled with or granted in aid of a legal interest conferred on the purchaser, and the interest so conferred may be a purely chattel interest or an interest in realty. If A. sells to B. felled timber lying on A.'s land on the terms that B. may enter and carry it away, the licence conferred is an irrevocable licence because it is

(1) (1882) 21 Ch. D. 9.

coupled with and granted in aid of the legal property in the timber which the contract for sale confers on B.: *Wood* v. *Manley*. (1) On the other hand, if A. by instrument not under seal for good consideration agrees that B. shall have the right of shooting and carrying away game on A.'s estate for a term of years, the licence conferred is at law a revocable licence, because the nature of the interest intended to be conferred is a profit à prendre, and cannot at law be created otherwise than by deed. The agreement, however, confers on B. a good interest in equity, and the licence is in equity an irrevocable licence, and a Court of Equity would accordingly restrain its revocation, and it would make no difference that B. had agreed to keep down the rabbits, though this term could hardly be specifically enforced by any Court: see *Frogley* v. *Earl of Lovelace* (2); *Lowe* v. *Adams*. (3) Even, therefore, if no interest at law passes by a contract for the sale of specific growing timber to be cut by the purchaser, it is difficult to see why on principle equity should not restrain the vendor from revoking the licence conferred by such a contract, though it might be unable to compel the purchaser to cut the timber if he refused to do so. When once the purchaser has cut any part of the timber, the legal property in the timber so cut is certainly in the purchaser, and the licence so far as that timber is concerned is irrevocable even at law, and a Court of Equity in granting an injunction would only be restraining the violation of a legal right. An injunction restraining the revocation of the licence, when it is revocable at law, may in a sense be called relief by way of specific performance, but it is not specific performance in the sense of compelling the vendor to do anything. It merely prevents him from breaking his contract, and protects a right in equity which but for the absence of a seal would be a right at law, and since the Judicature Act it may well be doubted whether the absence of a seal in such a case can be relied on in any Court: *Walsh* v. *Lonsdale*. (4) I do not think, therefore, that there is any substance in the objection that a timber contract of the kind I am considering cannot be specifically enforced by injunction because of a want of mutuality, and though there

(1) (1839) 11 Ad. & E. 34.
(2) (1859) John. 333.
(3) [1901] 2 Ch. 598.
(4) 21 Ch. D. 9.

PARKER J. 1909 — JAMES JONES & SONS, LIMITED v. TANKERVILLE (EARL).

is no direct authority on the point, it seems clear from the judgments in *Buxton* v. *Lister* (1) and *Gervais* v. *Edwards* (2) that neither Lord Hardwicke nor Lord St. Leonards can have thought any such objection could be entertained. It is clear in both these cases that what was contemplated was specific performance in the sense of compelling the execution of an instrument under seal which would turn into legal rights what were under the contract rights in equity only, and I see no reason why the legal rights of entry which would be conferred by the execution of such an instrument would be rights which a Court of Equity would refuse to protect by injunction because the instrument might contain provisions which the Court could not specifically enforce.

I am, however, not at all clear that a contract for the sale of timber to be cut by the purchaser does not confer an interest at law of such a nature as to make the licence to enter and cut ab initio an irrevocable licence. Baron Alderson in his well-known judgment in *Wood* v. *Leadbitter* (3), commenting upon the case of *Web* v. *Paternoster* (4), says that even if the licence in that case had been a mere parol licence, that is, a licence not under seal, yet the strong probability was that Web had purchased the hay as a growing crop with liberty to stack it on the land, and then the licence might be good as coupled with an interest. Inasmuch as he says elsewhere that a licence to enter on the land of the licensor and make a watercourse to flow on the land of the licensor would be revocable unless under seal, because an easement of this nature would lie in grant only, and that a valuable consideration for such a licence would make no difference, he must have been of opinion that the mere purchase of a growing crop of hay would or might confer an interest at law. Growing hay is not an emblement, and therefore what he says cannot be explained on the hypothesis that he was thinking of the sale of a mere chattel. Further, in *Marshall* v. *Green* (5) the plaintiff sued for trespass and trover in that the defendant had entered and cut down trees on the plaintiff's land. The land

(1) (1746) 3 Atk. 383.
(2) 2 D. & War. 80, 83.
(3) 13 M. & W. 838.
(4) (1619) Pal. 71.
(5) (1875) 1 C. P. D. 35.

was in lease, but the trees were reserved. Amongst other things the defendant pleaded leave and licence, and an agreement under which the plaintiff had sold the trees to him with liberty to cut down and remove them. It appeared that this agreement was verbal only, and that after the defendant had cut six of the trees the plaintiff repudiated the bargain and withdrew the licence. The defendant nevertheless cut down and carried away the remainder of the trees. A verdict was entered for the plaintiff, leave being reserved to the defendant to move for a verdict in his favour on the ground that the facts disclosed a right on the defendant's part to cut down and remove the trees. The defendant moved accordingly, and obtained a rule nisi which was subsequently made absolute. The actual points decided were (1.) that the case was not within s. 4 but was within s. 17 of the Statute of Frauds, and (2.) that the fact of the purchaser having cut six trees before the sale was repudiated was an acceptance and receipt of part of the goods sold within the meaning of s. 17. But it seems clear that, unless the agreement conferred an irrevocable licence, the plaintiff was entitled to succeed both in trespass and trover, though the defendant might have had a counter-claim for damages for breach of contract, and if the licence were irrevocable it could, on the principles laid down in *Wood* v. *Leadbitter* (1), only have been because the contract conferred on the defendant an interest at law in the timber comprised in it.

Lastly, in determining the effect of such a contract at law the effect of the Sale of Goods Act, 1893, has now to be considered. Goods are there defined in such a manner as to include growing timber which is to be severed under the contract of sale, whether by the vendor or the purchaser, and s. 52 of the Act seems to confer on the Court a statutory power of enforcing at the instance of a purchaser specific performance of a contract for the sale of ascertained goods, whether or not the property has passed by the contract.

I come to the conclusion, therefore, that the Court has ample jurisdiction to grant the injunctions asked for, though, of course,

(1) 13 M. & W. 838.

PARKER J. 1909 JAMES JONES & SONS, LIMITED v. TANKERVILLE (EARL).

it is in its discretion, if it so thinks fit, to award damages in lieu of relief by way of injunction. Under the circumstances of this case, however, there is, in my opinion, every reason for not exercising this discretion.

With regard to the timber already cut which is the plaintiffs' property; with regard to their tenancy of the cattle boxes; with regard to their sawmills, machinery, and other property on the defendant's land, their rights at law under the contract have not only been infringed, but have been deliberately and wantonly disregarded with every circumstance of indignity and violence, and even if I thought that damages would be an adequate remedy for what they have suffered, I should feel it incumbent on me, if I could, to assert the authority of the law by refusing to allow the defendant to retain the benefits he has attempted to gain by his high-handed and illegal action. I propose, therefore, to grant relief by way of injunction, not by way of damages only.

[His Lordship then proceeded to assess damages to be paid by the defendant to the plaintiffs.]

Solicitors: *Faithfull & Owen; Brown & Woolnough, for Charles Percy & Son, Alnwick.*

H. C. R.

In re THOMPSON'S PATENT.

PARKER J.

1909

[1909 T. 046.]

July 23, 28.

Patent — Prerogative — Jurisdiction of Privy Council to grant Second Extension — Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 18.

When a patent has once been extended for a further term the power given by s. 18 of the Patents and Designs Act, 1907, is exhausted, and the Court has no jurisdiction to grant a second extension.

This was a petition to the High Court for a second extension of letters patent, a previous extension for seven years having been granted by the Privy Council in 1902. The case is reported, (1902) 19 Rep. Pat. Cas. 565.

The letters patent in question, dated October 22, 1888, and numbered 15,159, were granted to James Coulthred Thompson for an invention of "a mechanical fuze for causing the explosion of shells and indicating the number of revolutions performed and distances traversed by projectiles."

In 1902 Mr. Thompson presented a petition to the Privy Council for a further term of fourteen years on the ground that he had not been sufficiently remunerated; the Judicial Committee reported that new letters patent ought to be granted to him for a term of seven years from the expiration of the patent of 1888; and this was accordingly done.

Mr. Thompson now presented this petition, alleging that owing to delays which had been entirely beyond his control he had not yet been adequately remunerated, and he asked that his patent might be extended for an additional term of fourteen years or for such term as to the Court might seem fit.

The Petitioner, in person. I ask for new letters patent for the full term of fourteen years. The Attorney-General does not oppose the application, and the fact that the term has already been extended shews that the invention is meritorious. It is true that in *In re Goucher's Patent* (1) it was held that the Court had no jurisdiction to grant a second extension, but that case was under the Patents for Inventions Act, 1835 (5 & 6 Will. 4,

(1) (1865) 2 Moo. P. C. (N.S.) 532.

PARKER J. 1909 THOMPSON'S PATENT, *In re.*

c. 83), and the Judicial Committee Act, 1844 (7 & 8 Vict. c. 69), and the application was opposed by the Crown. In the present case the Attorney-General raises no opposition, so that decision does not apply. In s. 4 of the Patents for Inventions Act, 1835, it is provided that a further extension of the term in the "said letters patent" may be granted. In s. 2 of the Judicial Committee Act, 1844, also the words used are "extension of the said patent term." In s. 25, sub-ss. 1, 5, of the Patents, Designs and Trade Marks Act, 1883, and s. 18, sub-ss. 1, 5, of the Patents and Designs Act, 1907, these expressions are deliberately altered and the words "his patent" are substituted with the intention, as I submit, of allowing a second extension of a term.

Sargant (*Sir W. S. Robson, A.-G.*, with him), for the Crown. The language of s. 18 of the Act of 1907 and s. 25 of the Act of 1883 is substantially the same as that of the Acts of 1835 and 1844, under which it has been held in *In re Goucher's Patent* (1) that the power given to the Judicial Committee to recommend an extension of a term is exhausted when an extension has been once recommended and new letters patent granted. No doubt the Act of 1907 must be interpreted in accordance with s. 32 of the Interpretation Act, 1889, which provides that a power may be exercised "from time to time as occasion requires"; and that Act was not in force at the time when *In re Goucher's Patent* (1) was decided. But that statute was not intended to alter the construction of an Act which is in language similar to that of one which has been explained by the Privy Council. Therefore, although the advisers of the Crown are of opinion that it would be just and reasonable that a further extension should be granted to the petitioner, they feel compelled to submit that the Court has no jurisdiction to entertain the petition.

The Petitioner, in reply.

PARKER J. This is a case in which if I had the power I should feel inclined to grant the prayer of the petition by extending the letters patent, at any rate for a period of seven years. But the difficulty is whether on the true construction of s 18 of the Patents and Designs Act, 1907, I have that power.

(1) 2 Moo. P. C. (N.S.) 532.

That section gives me power in certain cases to extend the term of letters patent. If the section is looked into it appears to be really a re-enactment of sections which have appeared from time to time in Patent Acts for very many years, and I cannot distinguish the terms of the section from the terms of those earlier statutes as to the true construction of which there is a decision of the Privy Council in 1865, namely, *In re Goucher's Patent.* (1) That case decided that on the true construction of the older statutes the power of extending letters patent was exhausted when the letters patent had been once extended. In this case the petitioner's letters patent have been once extended. They have been extended by an order of the Privy Council under the Act of 1883 for a period of seven years beyond the term of fourteen years which is the original term of all letters patent. I do not think, having carefully looked into s. 18 of the Act of 1907, that there is anything in it which justifies me in departing from the decision of the Privy Council. It is obvious that the section contemplates an application which is to be made at least six months before the term limited for the expiration of the patent. The term limited for the expiration of the patent is a term limited by law, namely, fourteen years; and then again it is clear, from sub-s. 5, that if it appears that the patentee has been inadequately remunerated by his patent the Court may by order extend the term of the patent for a further term not exceeding seven or, in exceptional cases, fourteen years. The term to be extended, therefore, is a term by law granted, and the application is to be made within a certain period before the expiration of that period. It appears to me that those words bring this case exactly within the ratio decidendi of *In re Goucher's Patent* (1), to which I have already referred, and shew that the intention of the Legislature was that when the original petition came before the authority dealing with the prolongation of patents, that authority should consider once for all whether that original term should be extended for seven years or for fourteen years—for seven years or any less period, or for fourteen years or any less period—and that when once they had exercised that discretionary

(1) 2 Moo. P. C. (N.S.) 532.

PARKER J. 1909 THOMPSON'S PATENT, *In re.*

power the case should be altogether taken out of the Act, and the power should be exhausted.

Under these circumstances, therefore, I am afraid I cannot concede the prayer of the petition, notwithstanding that it is a case in which otherwise I might have been inclined to do so, and notwithstanding that the Attorney-General is also of opinion that it is a case where the patent might reasonably be extended. I have no course open to me, therefore, except to dismiss the petition.

Solicitors: *Moon, Gilks & Moon; Solicitor to the Board of Trade.*

H. C. R.

EVE J. 1909 *April* 30; *May* 1; *June* 29; *July* 13.

In re NASH.

COOK *v.* FREDERICK.

[1908 N. 1380.]

Settlement—Real Property—Appointment—Validity—Remoteness—"Possibility on a possibility"—Equitable Interests—Election.

The old rule against double possibilities, namely, that after an estate has been limited to an unborn person for life a remainder cannot be limited to any child of such unborn person, applies to equitable interests as well as to legal remainders.

Monypenny v. *Dering*, (1852) 2 D. M. & G. 145, and *Whitting* v. *Whitting*, (1908) 53 Sol. J. 100, applied and followed.

Where a testamentary appointment, made in pursuance of a power in a settlement, has been held invalid on the ground that it was an infringement of the rule against double possibilities, the persons entitled in default of appointment who take larger benefits under the will of the testator than under the settlement will not be put to their election.

In re Oliver's Settlement, [1905] 1 Ch. 191, followed.

ADJOURNED SUMMONS.

By a settlement dated January 24, 1833, made on the marriage of Andrew John Nash and Elizabeth Nash, certain freehold hereditaments and premises were assured by A. J. Nash to the trustees of the settlement upon trust, during the joint lives of A. J. Nash and Elizabeth Nash, to pay to Elizabeth Nash the rents and profits thereof, with restraint on

anticipation, and after the determination of that estate, upon trust to permit Elizabeth Nash to receive the rents and profits for the remainder of her life, and after the decease of the survivor of A. J. Nash and Elizabeth Nash, upon trust for all and every, or such one or more of the children, grandchildren, or more remote issue, respectively, of the said A. J. Nash and Elizabeth Nash (such grandchildren or other more remote issue to be born before such appointment as thereinafter mentioned), and at such age or respective ages, and, if more than one, in such parts, shares, and proportions, and with such provisions as the said A. J. Nash, at any time, and from time to time, by deed or by will, should direct, limit, or appoint, and in default of such direction, limitation, or appointment, and subject to such as should have been made, upon trust that the trustees and the survivor of them and the heirs of such survivor, their and his assigns, should assure the said freeholds unto the child, if only one, or, if more than one, unto and between all the children of A. J. Nash and Elizabeth Nash, equally to be divided between them, and in case any of the children of the marriage should die under twenty-one, without leaving any issue living at his or her death, to transfer the original share of such child in the freehold hereditaments to the other or others of the same children, equally to be divided between them as tenants in common. There were two children only of the marriage who lived to attain twenty-one, namely, Lydia Emily Frederick and Jessie Marian Garnham. A third daughter, Florence Elizabeth Nash, died at the age of fourteen. Jessie Marian Garnham married in 1856, and died leaving two daughters only who attained twenty-one, namely, the defendants Jessie Maude Garnham and Edith Emily Jellicorse. Lydia Emily Frederick married in 1859, and died leaving two children only who attained twenty-one, namely, the defendant Sir Charles Arthur Andrew Frederick and the defendant Olive Emily Sebright. No appointment by deed was made by A. J. Nash.

By his will, dated November 9, 1887, in exercise of the power given him by the settlement of January 24, 1833, A. J. Nash appointed that the trustees of the settlement for the time being should, after the decease of the survivor of himself and his wife,

EVE J.
1909
NASH, *In re.* COOK *v.* FREDERICK.

stand possessed of the said freehold hereditaments and premises, as to one equal undivided moiety thereof, upon trust to pay to or permit Lydia Emily Frederick to receive the annual income thereof during her life for her separate use, and after her decease should stand possessed of such moiety in trust for her children, Sir Charles Arthur Andrew Frederick, and Olive Emily Sebright, in equal shares, absolutely; and as to the other moiety thereof in trust to pay to or permit Jessie Marian Garnham to receive the annual income thereof for her life, for her separate use, and after her death to stand possessed of such moiety in trust for her daughters, Jessie Maude Garnham, and Edith Emily Jellicorse, in equal shares, absolutely.

The testator A. J. Nash died on April 24, 1888, and Elizabeth Nash died on June 3, 1897.

Lydia Emily Frederick died on November 10, 1907, having by her will, made in 1901, given her real and personal property to her husband, the defendant Arthur Thomas Frederick, whom she appointed her sole executor.

Mr. Garnham died in 1907, and Mrs. Garnham in 1909, having by her will, made in 1902, left all her property to her daughters, Jessie Maude Garnham and Edith Emily Jellicorse, absolutely, in equal shares, as tenants in common.

The executors of Mrs. Frederick and Mrs. Garnham and the trustees of the settlements of Mrs. Sebright and Mrs. Jellicorse were also made defendants to the action.

The funds subject to the trusts of the settlement of January 24, 1833, amounted to 20,207*l.* 0*s.* 7*d.*

A summons was taken out on October 21, 1908, by the trustees of this settlement to determine, inter alia, (1.) whether the appointment by the will of A. J. Nash operated as a valid exercise of the power of appointment contained in the settlement of 1833 so far as regarded the appointments in favour of the defendants Sir Charles Arthur Andrew Frederick and Olive Emily Sebright, and the defendants Jessie Maude Garnham and Edith Emily Jellicorse respectively. (2.) If the appointment was not a valid exercise of the power, or failed as to any part thereof, that it might be determined whether the representatives of Lydia Emily Frederick and Jessie Marian Garnham, the

persons entitled in default of appointment, were put to their election to confirm the said appointments.

T. T. Method, for the trustees of the settlement of 1833.

P. O. Lawrence, K.C., and *E. Beaumont*, for Mrs. Sebright and the trustees of her marriage settlement. It is a perfectly good appointment so far as the rule against perpetuities is concerned. The only question is whether the rule against double possibilities is applicable to equitable estates. In *Whitby* v. *Mitchell* (1) this rule was held to apply to legal remainders. The rule has received almost universal condemnation and should be confined strictly to legal remainders. There is no reason for extending it to equitable interests, and certainly there is nothing to compel the Courts to do so. It has been held that it does not apply to personal estate: *In re Bowles* (2), where Farwell J. held that the rule existed only to the extent stated in the head-note to *Whitby* v. *Mitchell*. (1) No doubt it has been held that the rule against perpetuities applies to legal contingent remainders as well as to equitable limitations: *In re Ashforth*. (3) But a clear distinction is drawn between legal and equitable remainders in the case of *Abbiss* v. *Burney* (4), and Jessel M.R. said that in some respects contingent equitable remainders did not stand upon the same footing as legal remainders. In *In re Frost* (5) the limitation was legal, and the rule against a possibility upon a possibility was recognized as existing.

The case which may be relied upon by the respondents is *Monypenny* v. *Dering* (6), where it may be said that the Lord Chancellor was dealing with equitable estates, but that does not appear to have been argued before him at all. Nor did it really arise, as the limitations were held to be void as offending against the rule as to perpetuities. It is, therefore, an obiter dictum so far as the present case is concerned. In the case of *Cattlin* v. *Brown* (7) the Court referred to Mr. Preston's argument in *Mogg*

(1) (1889) 42 Ch. D. 494; (1890) 44 Ch. D. 85.
(2) [1902] 2 Ch. 650.
(3) [1905] 1 Ch. 535.
(4) (1881) 17 Ch. D. 211, 229.
(5) (1889) 43 Ch. D. 246.
(6) 2 D. M. & G. 145.
(7) (1853) 11 Hare, 372.

EVE J.
1909
NASH, *In re.* COOK *v.* FREDERICK.

v. *Mogg* (1), but that was a clear case of an infringement of the rule against perpetuities. The rule against double possibilities is not favourably viewed by text-writers: Joshua Williams on Real Property, 19th ed. pp. 355, 356, 401, 402; 20th ed. pp. 402—404; Farwell on Powers, 2nd ed. p. 286; Gray on Perpetuities, 2nd ed. pp. 76, 88, 101—103, 256, 262, 264, 288. These authors confine the rule strictly to legal remainders, and not to equitable interests, which stand on a different footing: Challis on Real Property, 2nd ed. ch. 11.

H. T. Method, for Mrs. Jellicorse, another appointee, adopted the same argument.

G. B. Rashleigh, for the executors of Mrs. Garnham.

Jessel, K.C., and *Wurtzburg*, for those entitled in default of appointment. The rule enunciated in *Whitby* v. *Mitchell* (2), which was a case of legal remainders, states a principle which is applicable to equitable estates also, inasmuch as equity follows the law. The rule is stated in the head-note to *Whitby* v. *Mitchell* (2); it is well settled and was recognized by the House of Lords in *Honywood* v. *Honywood*. (3) In the case of *In re Bowles* (4) Farwell J. was only dealing with personal estate, and the rule in question was inapplicable. It is difficult to see why there should be any difference made between legal and equitable interests where precisely the same mischief, which it was the object of the rule to prevent, would result in both cases. It would only increase the legal anomalies which Farwell J. laments in *In re Ashforth*. (5)

The object of the rule is a salutary one, namely, to prevent land being tied up for long periods: Burton's Real Property, s. 780; Fearne on Contingent Remainders, 10th ed., vol. i. pp. 502, 565; Lewis on Perpetuities, p. 408. The rule against perpetuities applies alike to contingent remainders and equitable limitations. Equity thus follows the law: *Humberston* v. *Humberston*. (6) In *Monypenny* v. *Dering* (7) the rule against double possibilities was applied to equitable interests, and in the recent case of

(1) (1811) 1 Mer. 654.
(2) 42 Ch. D. 494; 44 Ch. D. 85.
(3) (1905) 92 L. T. 814.
(4) [1902] 2 Ch. 650.
(5) [1905] 1 Ch. 535, 546.
(6) (1716) 1 P. Wms. 332.
(7) 2 D. M. & G. 145.

Whitting v. *Whitting* (1) a similar limitation to that which occurs in the present case was held void, whether considered with regard to the rule against perpetuities or to the rule against double possibilities. That case was apparently determined on the ground that the limitations were void as transgressing the rule against perpetuities, though the other point was also taken. The authorities, therefore, establish the proposition that the rule extends to equitable interests. *Cattlin* v. *Brown* (2) is really an authority in our favour. In *Duke of Marlborough* v. *Earl Godolphin* (3) the rule as to a possibility upon a possibility was acceded to. So in *In re Oliver's Settlement* (4), which was a case of equitable limitations, a similar appointment was held void for perpetuity, and further that no case of election was raised by the will. The rule in question is one of public policy, and confusion would be created if it was abrogated. The appointment is therefore bad as to the limitations in remainder.

P. O. Lawrence, K.C., in reply. The cases of *Humberston* v. *Humberston* (5) and *Duke of Marlborough* v. *Earl Godolphin* (3) have very little to do with the rule in question here. It is the rule against perpetuities which was dealt with in those cases. The rule against double possibilities is an artificial and arbitrary rule, having its origin in feudal times and applicable only to legal estates, and is one which ought not to be extended.

Cur. adv. vult.

June 29. EVE J. delivered the following written judgment:—This summons raises a question of some interest to conveyancers and other real property lawyers. It is this: Does the rule by which the limitation of any estate in remainder, after an estate given to an unborn person for life, to any child of such unborn person, is prohibited, and which rule, according to the late Mr. Joshua Williams, is apparently derived from the old doctrine which prohibited double possibilities, and has itself come to be spoken of as the rule against double possibilities, apply to cases where the limitations are of equitable interests and the

(1) 53 Sol. J. 100.
(2) 11 Hare, 372.
(3) (1759) 1 Eden, 404.
(4) [1905] 1 Ch. 191.
(5) 1 P. Wms. 332.

EVE J. 1909 NASH, *In re.* COOK *v.* FREDERICK.

legal estate is in trustees? [His Lordship stated the material parts of the settlement of January 24, 1833, and of the will of Andrew John Nash, and continued:—]

In these circumstances the question has been raised whether the appointment, so far as it purports to create interests in remainder after the life interests of the two daughters, is valid, or whether it is to that extent invalid as an infringement of the rule against double possibilities.

It is conceded that if the interests for life and in remainder were created by means of legal limitations, the facts of the case would be indistinguishable from those of *Whitby* v. *Mitchell* (1), and that, according to the decision in that case, the only part of the appointment which would be good would be the limitation to each daughter for life for her separate use. But it is argued that the rule against double possibilities is limited in its application to legal limitations, and has never yet been extended, and ought not now to be extended, to equitable estates.

Against this contention it is urged (1.) that, the rule being a salutary one, founded on very good sense, and calculated to defeat that tying up of land from alienation against which the Courts have persistently struggled—I am quoting the substance, if not the actual words, of expressions to be found in the judgments in *Whitby* v. *Mitchell* (1)—there is no reason or sense in limiting it to a particular form of settlement, and not applying it to defeat all such ingenious devices for tying up land as are referred to by Lindley L.J. at the conclusion of his judgment; (2.) that the rule has in fact already been recognized and treated in reported cases as being applicable to equitable estates; and (3.) that even if it has not yet been so applied it ought to be, in that equity should follow the law, and that no sanction should be given to a condition of things which would make the validity of a settlement depend on the particular location of the legal estate.

The decision in *Whitby* v. *Mitchell* (1) has met with a large amount of criticism in the profession, and much of the argument addressed to me on behalf of those who uphold the validity of the appointment in this case was directed to calling attention to

(1) 42 Ch. D. 494; 44 Ch. D. 85, 90, 93.

those criticisms, not, of course, with a view of suggesting that the decision is not binding upon this Court, but by way of foundation for the argument that the application of the rule thereby established ought not to be extended to a case where the limitations are not legal limitations; and in this connection much reliance was placed on the arguments addressed to the Court in *Whitby* v. *Mitchell* (1), wherein it was rather assumed that the rule would not be held applicable to equitable limitations, and to the opening sentence of Farwell J.'s judgment in *In re Boulee* (2), where he says, "I think it is reasonably plain that whatever the doctrine of 'a possibility on a possibility' may have originally meant, at present it exists only to the extent stated in the head-note to *Whitby* v. *Mitchell*." (1)

Since the case was argued before me I have taken the opportunity of reading at length all the criticisms to which my attention was called, and of referring to many of the authorities cited therein. I have also read the observations of some who regard the decision with more approval, and the net result of it all comes to this, that those who disapprove of the decision do so mainly on the ground that it gives vitality to a supposed rule of so mischievous an origin, and of antecedents so doubtful, as to constitute it "a non-existent rule based on an exploded theory" (see Gray on Perpetuities, 2nd ed. s. 290), a phrase which is descriptive of something which is not and never has been, or, if it has been, ought not to have been. But these criticisms do not really help me to a decision in this case, and the same observation applies to the admissions made in the argument in *Whitby* v. *Mitchell* (1) and to the extract from Farwell J.'s judgment in *In re Boulee* (2), for in neither case was the applicability of the rule to equitable interests under consideration. The truth is that I have to approach the question from a standpoint which not only treats the rule as a subsisting one, but regards it as embodying a useful and intelligent restraint. Why then should it be restricted to legal limitations? Not because they are not subject to the rule against perpetuities, for the contrary has now been established and had been established before *Whitby* v. *Mitchell* (1) was decided by the Court of Appeal—

(1) 42 Ch. D. 494; 44 Ch. D. 85. (2) [1902] 2 Ch. 650, 653.

EVE J.
1909
NASH, *In re.* COOK *v.* FREDERICK.

In re Frost (1) and *In re Ashforth* (2)—and, as the law now stands, legal contingent remainders and equitable limitations—*Abbiss* v. *Burney* (3)—are alike subject to the rule against perpetuities. It is true that in the last-mentioned case Sir George Jessel points out some respects in which contingent remainders do not, or did not, stand upon the same footing as legal remainders, but his observations were directed to a state of things existing under the law as it stood prior to the passing of the Act to amend the law as to contingent remainders (40 & 41 Vict. c. 33), and since that statute the grounds of distinction have ceased to exist in respect of all remainders created by instrument executed after its passing. I do not think, therefore, the observations referred to, although they point out an important distinction between contingent equitable remainders and legal remainders, and the reason for it, can fairly be used as an argument in support of the distinction here sought to be established. In substance, the argument by which it is sought to establish the distinction resolves itself into an attack upon the rule itself, and to an assertion (1.) that it has never been applied to equitable interests, and (2.) that in *Cattlin* v. *Brown* (4) Page Wood V.-C. stated and adopted as embodying the law a rule which he could not have so stated and adopted had he not treated the rule against double possibilities as inapplicable to such a case as he was then adjudicating upon, that is, a case where the limitations were equitable.

For reasons which I have already endeavoured to make clear, I am constrained to reject so much of the argument as attacks the rule itself; and it remains to consider how far the authorities support the contention that the rule has been recognized as having no application to equitable interests. The passage in *Cattlin* v. *Brown* (4) upon which so much reliance is placed is as follows: "The rule is stated in the able argument of Mr. Preston in *Mogg* v. *Mogg*. (5) He says, 'A gift to an unborn child for life is good, if it stops there; but if a remainder is added to his children or issue as purchasers, it is not good, unless

(1) 43 Ch. D. 246.
(2) [1905] 1 Ch. 535.
(3) 17 Ch. D. 211, 229, 230.
(4) 11 Hare, 372, 375.
(5) 1 Mer. 654.

there be a limitation of the time within which it is to take effect.' " "That," continues the Vice-Chancellor, "is, I think, a perfectly accurate statement of the law which I am to apply to this case." To appreciate these observations it is necessary to examine the facts in *Cattlin* v. *Brown* (1) and also in *Mogg* v. *Mogg*. (2) In *Cattlin* v. *Brown* (1) the question arose under the will of Frances Bannister, who had thereby devised an estate to Thomas Bannister Cattlin for life, and after his decease to all and every his children or child for their lives in equal shares, and after the decease of any or either of them, then the part or share of him, her, or them so dying was devised unto his, her, or their child or children lawfully begotten or to be begotten, and to his, her, or their heirs for ever, as tenants in common. The devises were legal devises, but the estate was, in fact, in mortgage at the date of the death of the testatrix in 1805, and, as I read the report, was also in mortgage when the case was tried in 1853, to secure sums which had been raised to pay debts of the testatrix. Thomas Bannister Cattlin had sixteen children. Of these, six were born before and ten after the death of the testatrix, and children in each class had issue. It was conceded that the remainder in fee to the children of those children who were born after the death of the testatrix could not take effect, and the question was whether, in these circumstances, the remainder in fee to the children of those children who were born in the lifetime of the testatrix could take effect; in other words, whether the gift, although void for remoteness in respect of some of the objects, could nevertheless be treated as a good and valid gift to such of the objects as were within the limits allowed by law. In the result the Vice-Chancellor held that the children of those children of Thomas Bannister Cattlin who were born in the lifetime of the testatrix could take, because the gift to them took effect within the limits allowed by the law, and the gift to every individual child was single and independent of the gift to every other individual, and could not be affected by the result of the gift to such other individuals. I cannot see anything in the judgment to shew that it proceeded upon the footing that the estate was in mortgage and the subject-matter of the devise

(1) 11 Hare, 372, 375. (2) 1 Mer. 654.

EVE J. 1909 NASH, *In re.* COOK *v.* FREDERICK.

equitable interests, and from beginning to end of the report there is no reference to the rule against double possibilities, except such as is to be gathered from the reference to Mr. Preston's argument in *Mogg* v. *Mogg*. (1) Nor does the decision itself offend against the rule. The devise for life to all the children of Thomas Bannister Cattlin, irrespective of the fact whether they were born at the date of the death of the testatrix, involved a gift to unborn children; so far as it was followed by a remainder to the unborn children of children born at the date of the death of the testatrix it did not involve a double possibility and was held to be good; so far as it was followed by a remainder to the unborn children of children unborn at the date of the death of the testatrix it did involve a double possibility and was held to be bad. With all respect to the arguments addressed to me, I cannot see my way to treating *Cattlin* v. *Brown* (2) as an authority for holding that the rule against double possibilities does not apply to equitable interests.

Does *Mogg* v. *Mogg* (1) carry the matter any further? In that case there were four devises, and, in the events which happened, the questions turned upon the respective interests which the children and grandchildren of Sarah Mogg, a daughter of the testator, took in the subject-matter of each devise. Sarah Mogg had nine children, four born in the testator's lifetime, and five after his death. Two only of the devises are material to be considered for present purposes. The first material devise was a legal devise, in the events which happened, of the Littleton freehold estates "unto and equally among the child and children begotten and to be begotten on the body of my daughter, Sarah Mogg, during his, her, and their life and lives, and from and after the decease of such child and children, I give and devise the same unto the lawful issue of such child and children and their heirs as tenants in common." The suit was instituted by three of the children of Sarah Mogg, born after the testator's death, against the other children of Sarah Mogg and their issue, and the representatives of such of them as were deceased, praying that the rights of the parties under the will might be declared. Mr. Preston was counsel for the plaintiffs, and upon the above stated

(1) 1 Mer. 654. (2) 11 Hare, 372, 375.

devise he argued that the issue of Sarah Mogg's children, upon the true construction of the devise, were intended to take estates tail, and not in fee. His argument was ultimately accepted by the Court, and it was held that under this devise all the nine children took as tenants in common in tail, with cross remainders. On behalf of the defendants it was argued that the word "issue" was a word of purchase and not of limitation, that the gift was a gift to the children for life, remainder to their children in fee, and that this last limitation, being to the children of unborn children in the cases of all the children born after the death of the testator, was too remote, and therefore void. It was in the course of his argument upon the construction of this devise that Mr. Preston made the statement cited with approval by the Vice-Chancellor in *Cattlin* v. *Brown*. (1) It is on page 664 of the report, and he cites in support of his first two propositions, "a gift to an unborn child for life is good if it stops there; but, if a remainder is added to his children or issue as purchasers, it is not good," Wilmot J.'s judgment in *Evans* v. *Astley* (2), *Hay* v. *Earl of Coventry* (3), and *Brudenell* v. *Elwes*. (4) In *Hay* v. *Earl of Coventry* (3) Lord Kenyon C.J. says, "The law is now clearly settled that an estate for life may be limited to unborn issue, provided the devisor does not go farther and give an estate in succession to the children of such unborn issue;" and in *Brudenell* v. *Elwes* (4) he adds, "An unborn child may be made tenant in tail, but not tenant for life, with a limitation to his children as purchasers." In support of the qualification on his second proposition, "unless there be a limitation of the time within which it is to take effect," Mr. Preston is reported as relying on *Hockley* v. *Mawbey*. (5) In *Hockley* v. *Mawbey* (5) there was a devise to the testator's widow for life, "and from and immediately after her decease to his son Richard and his issue lawfully begotten, or to be begotten, to be divided among them as he should think fit; and in case he should die without issue," a gift over. The questions were whether Richard took an estate tail or for life, and whether the contingent remainder on

(1) 11 Hare, 372, 375.
(2) (1765) 1 W. Bl. 522.
(3) (1789) 3 T. R. 83, 86.
(4) (1801) 1 East, 442, 452.
(5) (1790) 1 Ves. 142, 150.

EVE J. 1909 NASH, *In re.* COOK v. FREDERICK.

his death without issue was not too remote, being limited after an indefinite failure of issue. It was held that on the true construction of the devise Richard took an estate for life, that his children took vested interests independently of their father, except as to the proportions, and, further, that although the word "issue" would extend to grandchildren and any other degree of kindred, however remote, so as to make them objects among whom the power of the son to appoint was to obtain, yet they must all be in existence during his life, and if so, and if the estate vested in them, it was of no consequence to say they were not the immediate descendants of the son. "It is," added the Lord Chancellor, "an estate devised upon two alternative contingencies: one, that there were objects capable of taking under the first limitation; another, that there were none such, but that there were objects capable of taking under the second." And on this the gift over was held to be good. The other material devise in *Mogg* v. *Mogg* (1) was a devise of the Mark estate to trustees in trust that they should "equally pay and apply the issues and profits thereof towards the support and maintenance of the child and children, begotten and to be begotten, of Sarah Mogg during his, her, and their life and lives," and after the decease of such children the testator "gave and devised the said estate to the lawful issue of such child and children of his said daughter Sarah Mogg to hold unto such issue, his, her, and their heirs, as tenants in common." The first gift being to the trustees during the lives of the children and the second to the grandchildren themselves, Mr. Preston admitted that the equitable and legal interests could not unite so as to be brought within the rule in *Shelley's Case* (2), and the Court held that all the nine children of Sarah Mogg took equitable interests for their lives, and the life of the survivor of them, and that, on the decease of the survivor, the estate went over to the issue of the four children born in the testator's lifetime, by purchase, as tenants in common.

I have felt constrained to go into these matters in detail because of the extent to which those who support the appointment have relied on the adoption by the Vice-Chancellor in

(1) 1 Mer. 654. (2) (1579) 1 Rep. 93 b.

Cattlin v. *Brown* (1) of the law as stated by Mr. Preston in *Mogg* v. *Mogg* (2), but the examination which I have made into the facts of the two cases, and of the cases upon which Mr. Preston's statement is based, appears to me to shew this, that the statement had no direct reference to the rule against double possibilities as distinct from the rule against perpetuities, and still less to any discrimination between the applicability of the rule to legal remainders and equitable interests. The real point involved in all the cases, and the only point to which the arguments and judgments were addressed, was one of remoteness, and I cannot find in any of the passages relied upon any indication that the rule against double possibilities, as distinct from the rule against perpetuities, was under consideration. Moreover, Mr. Preston, when he used the argument, was dealing with a case of legal limitations—the devise of the Littleton freehold estates to the children of Sarah Mogg and their issue being a legal devise—and the authority on which he relied in support of his qualification of the statement that a remainder, after a life interest to an unborn child, to his issue as purchasers, was void, was also a case of a legal devise, and if his argument correctly stated the law it was the law applicable to legal and equitable limitations alike, and not to the latter only. During the argument in *Whitby* v. *Mitchell* (3), in the Court of Appeal, Cotton L.J. repudiated the suggestion that a limitation to the children of an unborn child would be good if it were within the limits of remoteness.

I turn now to consider the cases relied on by those who contend that the rule applies alike to legal limitations and equitable interests. I do not think *Humberston* v. *Humberston* (4) throws much light on the matter. There the testator devised lands to the Drapers' Company in trust to convey the premises to his godson Matthew Humberston for life, and afterwards, upon the death of the said Matthew, to his first son for life, and so to the first son of that first son for life, and if no issue male of the first son, then to the second son of the said Matthew for life, and so to his first son, and on failure of issue of the first Matthew then

(1) 11 Hare, 372, 375.
(2) 1 Mer. 654.
(3) 42 Ch. D. 494; 44 Ch. D. 85.
(4) 1 P. Wms. 332.

EVE J.
1909
NASH, *In re.* COOK *v.* FREDERICK.

to another Matthew for life and to his first son for life, with remainders over to very many Humberstons for their lives successively, and their respective sons, when born, for their lives, without giving an estate in tail to any of them, or making any disposition of the fee. On a bill filed by the first devisee against several of those entitled in remainder, and others, for the execution of the trusts of the will, the Lord Chancellor treated the will as a vain attempt to make a perpetuity for successive lives, but in order to give effect to the testator's intentions, so far as consistent with the rules of law, he directed a settlement to be made of the trust estate, with limitations to the several persons named to be tenants for life in the will and to the heirs male of their bodies in strict settlement. I think it is difficult to extract from this a decision that the rule against double possibilities applies to equitable interests. It was a case in which the doctrine of cy-près was applied to the construction of the will. *Monypenny* v. *Dering* (1) is much more in point. There the testator devised his Maytham Hall estate and all other his residuary real estate to trustees upon trust to sell a sufficient part to pay his debts and certain legacies, and subject thereto to stand seised thereof, "Upon trust to permit and suffer my brother Phillips Monypenny to receive and take the rents issues and profits thereof for his life and after his decease upon trust for the first son of the body of the said Phillips Monypenny for life and from and immediately after his decease upon trust for the first son of the body of such first son and the heirs male of his body and in default of such issue upon trust for all and every other the son and sons of the body of the said Phillips Monypenny severally and successively according to seniority of age for the like interests and limitations as I have before directed respecting the first son and his issue." By a codicil the testator introduced a life interest in Maytham Hall in favour of his widow. The testator died in 1822, his widow in 1826, and thereupon Phillips Monypenny entered into possession. Treating himself as tenant in tail in possession, in 1827 he suffered a recovery of the estate, the uses of which were declared to enure to him in fee. Thereafter he created a charge by way of jointure

(1) 2 D. M. & G. 145.

on the estate, and, having devised it by his will, he died in 1841 without having had any children. In 1842 the suit was instituted by a person interested under the limitations contained in the will of the testator in the event of Phillips Monypenny dying without issue, and he raised questions as to the construction of the testator's will, and the validity of the recovery suffered by Phillips Monypenny and the consequent dealings by him with the estate. The suit, which involved several other questions besides the ones I have just stated, came on to be heard in due course, and two cases, and a supplemental case, were thereupon directed by Wigram V.-C. for the opinion, first, of the Court of Exchequer, and subsequently of the Court of Common Pleas, the first question raised in each of the cases being "What estate or estates in possession or in remainder did Phillips Monypenny take under the will and codicil of the testator in the devised property?" The case before the Court of Exchequer is reported. (1) In each case the will of the testator was stated as though it contained a legal devise to the use of Phillips Monypenny and his issue, in place of the equitable interests thereby given. It was argued that the sons of Phillips Monypenny took estates in tail male, or that by the application of the doctrine of cy-près they could be held so to do, but the Court of Exchequer decided that so to hold, so far from being an application of the cy-près doctrine, would be to hold that they took estates which would carry the property in a different course of succession from that intended by the testator. Accordingly they answered the question by saying that Phillips Monypenny took an estate for his life in remainder expectant on the death of the testator's widow, with remainder to his eldest son for life, and that all the subsequent limitations were void for remoteness. The Court of Common Pleas confined their answer to the expression of their opinion that Phillips Monypenny took an estate for life in remainder after the life estate of the widow. Wigram V.-C., after an elaborate argument, gave judgment agreeing with the certificates of the Courts of law, and an appeal from this judgment having been presented, the Lord Chancellor (Lord St. Leonards) gave judgment on this

(1) (1847) 16 M. & W. 418.

EVE J. 1909 NASH, *In re.* COOK *v.* FREDERICK.

part of the case on the conclusion of the arguments. After referring to the question as one of great importance, he proceeds (1): "The will upon which the question I am now going to decide arises, though an unusual one, is very plain, and, as far as mere language goes, admits for the greater part of no dispute. However singular it may be, the testator for some reason or other seems to have had a great desire to provide only for the first son of the person to whom he was giving property. Thus, in one part of the will he gives a certain estate to the use of one of his nephews for life, and then for the first son of the body of that nephew and the heirs male of the body of such first son, and there he leaves off; and again in like manner he gives another property to another nephew for life, and to the first son of the body of that nephew and the heirs male of his body, thus making it clear that as to those two estates he did not intend to provide for any person except the first son of the devisee and the heirs male of the body of such first son. This, however, does not immediately relate to the question which arises on the general gift, with which I have now to deal. By it the legal fee is given to trustees, and they are to raise money for the payment of debts, and then the testator limits the estates (the Maytham Hall and residuary real estate) in trust for his brother Phillips Monypenny for life without impeachment of waste, then in trust for the first son of the body of Phillips Monypenny for his life, then 'immediately after his decease upon trust for the first son of the body of such first son and the heirs male of his body, and in default of such issue, upon trust for all and every other the son and sons of the body of my said brother Phillips Monypenny severally and successively according to seniority of age, for the like interests and limitations as I have before directed respecting the first son and his issue; and in default of issue of the body of my said brother Phillips Monypenny, or in case of his not leaving any at his decease, upon trust for my said brother Thomas Monypenny for and during the term of his natural life without impeachment of waste, and from and immediately after his decease upon trust,' &c. Stopping here for a moment, and without including the gift over ('and in default

(1) 2 D. M. & G. 168.

of issue of the body of my said brother Phillips Monypenny,' &c.), the limitations, if construed as they stand, would, without any aid from rules of law and attending merely to the construction, admit of no doubt. If the issue of Phillips Monypenny had been born in the lifetime of the testator, the devise would have been valid; but Phillips Monypenny never had any issue, and with regard to him no one is provided for but his first unborn son and the first unborn son of that unborn son and the heirs male of the body of that son; the limitation in default of such son being to all other the son and sons of Phillips Monypenny in like manner. Then the rule of law forbids the raising of successive estates by purchase to unborn children, that is, to an unborn child of an unborn child. With this rule I have never meant to interfere, for it is too well settled to be broken in upon; and the result therefore is, taking the limitation as it stands, that there is a good life estate to Phillips Monypenny and to his first unborn son if he had one, and that the remainder to the other sons and their issue is absolutely void, as being upon too remote a contingency." I think in the passage I have just read the Lord Chancellor is referring to the rule against double possibilities and not to the rule against perpetuities, and this was the view of Cotton L.J. and Lopes L.J. in *Whitby* v. *Mitchell* (1), and if this be correct, he is certainly treating it as a rule applicable to the case before him, that is to say, a case where the legal estate was in trustees, and the interests voided by the rule were equitable ones. I think that judgment is one which leaves me no alternative but to hold that the rule applies to equitable interests. I am fortified in this conclusion by a recent decision of Neville J. In *Whitting* v. *Whitting* (2) that learned judge had to consider the effect of a settlement of certain real estate vested in trustees upon trust for the settlor for life, and after his death in trust for any wife of the settlor for her life, and after the decease of the survivor in trust for all or such one or more exclusively of the others or other of the issue of the settlor by any wife (such issue to be born during the life of the settlor) as the settlor should by deed or will appoint, and in default of appointment in trust for all the children, or any child

(1) 42 Ch. D. 494; 44 Ch. D. 85. (2) 53 Sol. J. 100.

EVE J.
1909
NASH, *In re.* COOK *v.* FREDERICK.

of the settlor, who being sons, or a son, should attain the age of twenty-three years, or being daughters, or a daughter, should attain that age or marry under that age, and if more than one in equal shares. He held this last limitation to be void whether considered with regard to the rule against perpetuities or to the rule against double possibilities. "In the one case," he added, "the estate need not vest within a life or lives in being at the date of the settlement and twenty-one years, and in the other there is a remainder to the unborn children of a wife possibly unborn at the date of the settlement." That decision is certainly an application of the rule against double possibilities to a case of equitable interests, and although the limitations were void as transgressing the rule against perpetuities, and it was not, therefore, necessary to apply the other rule in order to arrive at the judgment pronounced, I am informed by counsel engaged in the case that the applicability of the rule against double possibilities was in fact determined after full argument. The case, therefore, is an authority directly in point, and in any event I should have felt bound to follow it even if I had not, for the reasons I have already endeavoured to state, arrived at the same conclusion.

In my opinion the rule applies alike to legal remainders and equitable interests, and, accordingly, I must declare, in answer to the first question in the summons, that the appointment therein mentioned did not operate as a valid exercise of the power of appointment reserved to the testator by the settlement of January 24, 1833, so far as regards the limitations in favour of the defendants Sir Charles Arthur Andrew Frederick and Olive Emily Sebright and the defendants Jessie Maude Garnham and Edith Emily Jellicorse respectively.

July 13. The second question raised by the summons now came on for argument as to whether any question of election arose in the case of the representatives of Mrs. Frederick and Mrs. Garnham. Under the will of the testator A. J. Nash, Mrs. Frederick and Mrs. Garnham, being the persons entitled in default of appointment, were entitled to benefits in respect of his other property which were of considerably more value than that which came to them under the appointment.

T. T. Method, for the trustees of the settlement of 1833, referred to the remarks in the preface to Theobald on Wills, 7th ed. p. ix.

P. O. Lawrence, K.C., and *E. Beaumont*, for Mrs. Sebright and the trustees of her settlement. The representatives of the two daughters of the testator are put to their election as to whether they will confirm the appointment. The cases in which the rule against perpetuities has been infringed, and where it was held that there was no election, do not apply to the present case. Here there is no infringement of that rule, the persons are ascertained within proper limits, and it is only a case of the technical rule against double possibilities. The rule as to election is stated in Farwell on Powers, 2nd ed. p. 376, and applies to appointments under powers. In Theobald on Wills, 7th ed. p. 105, it is stated that the majority of cases are in favour of the view that there is no case of election where a testator makes an appointment which is void for perpetuity, and at the same time gives the persons entitled in default of appointment property of his own. In *In re Bradshaw* (1) it was held by Kekewich J. that there was a case of election, but in the other cases mentioned by Mr. Theobald of *In re Oliver's Settlement* (2), *In re Beales' Settlement* (3), and *In re Wright* (4), where the gifts were bad as infringing the rule against perpetuities, the principle of election was held not to apply. Those cases, however, do not govern the present.

[EVE J. If the appointment is held to be bad, will the Court say that there is to be election?]

There is no reason why the decisions upon infringements of the rule against perpetuities should apply to cases where the rule against double possibilities is in question.

Counsel for the respondents upon this point were not called upon.

EVE J. I think I am bound by the authority and ruling of Farwell J. in *In re Oliver's Settlement.* (2) In that case the question was whether the appointment infringed the

(1) [1902] 1 Ch. 436.
(2) [1905] 1 Ch. 191.
(3) [1905] 1 Ch. 256.
(4) [1906] 2 Ch. 288.

EVE J.
1909
NASH, *In re.* COOK *v.* FREDERICK

rule against perpetuities, and the learned judge, after stating that the rule was an ancient rule of English law, one of public policy, and one the Courts ought to uphold and not to assist in evading in any way, considered the judgment of Kekewich J. in *In re Bradshaw* (1), in which Kekewich J. held that election did arise in a similar case where the appointment was an appointment which offended the rule against perpetuities. After considering that judgment Farwell J. says this (2): "Kekewich J. has said, and it is the basis of his judgment, that it is immaterial whether the appointment fails because it offends some rule of law, or because it offends the construction of the power. With all deference to him, the difference appears to me to be vital. In the one case the testator openly and avowedly breaks the general law, and asks the Court of Equity to participate in his illegal act by giving effect to it; in the other he merely attempts to exceed the limits set to his power by the donor thereof in the particular case—limits which the donor might have extended without any breach of general law. Thus, limitations which infringe the rule against perpetuity are void on the face of the will, but a devise of Blackacre by a testator who has no interest therein is not illegal, nor is it void on the face of the will, but depends on an inquiry into the testator's title." In this case I have held that the testator has made an appointment which fails because it offends the rule against double possibilities, that is to say, because it offends against a rule of law which, as the authorities stand, one must also treat as a rule of public policy, and one which the Court is bound to uphold and ought not to assist in evading. In these circumstances I hold that I am bound by the principles underlying the judgment I have just quoted. This appointment being an appointment offending against the rule, I must hold that no question of election arises. The costs will be borne by the real estate, with liberty to apply.

Solicitors: *Budd, Brodie & Hart; Tylee & Co.; Sharpe, Pritchard & Co.*

(1) [1902] 1 Ch. 436. (2) [1905] 1 Ch. 197.

G. M.

GREAT WESTERN RAILWAY COMPANY *v.* CARPALLA UNITED CHINA CLAY COMPANY, LIMITED (No. 2).

EVE J.
1909
July 15, 27.

[1907 G. 2110.]

Practice—Costs—Counsel's Fees—Three Counsel—Scientific Evidence—Special Circumstances—Qualifying Fee of Witness not called—Taxation—Rules of the Supreme Court, Order LXV., *rr.* 9, 27, *sub-rr.* 29, 38.

In an action, ultimately dismissed with costs, raising complicated questions of fact and law, involving at the trial the examination of varied scientific theories and investigations, and imposing a large amount of labour and heavy responsibility on those conducting it at the trial:—

Held, that there were such special circumstances in the case as to justify the allowance on taxation of three counsel to one set of defendants, and that it was not material to take into account the fact that their co-defendants, whose interests up to a certain point were the same, were represented by two counsel.

Each defendant is entitled to fight his own case, and is not to be deprived of the advantage of so doing by the fact that his co-defendants were also doing their duty by themselves in fighting their own battle.

Where a personal view of the locus in quo was essential to enable a scientific witness to make his evidence of most value a proper qualifying fee was allowed, although he was not ultimately called as a witness.

SUMMONS TO REVIEW TAXATION.

The above-mentioned action, reported (1), raised the question whether china clay under a piece of land in Cornwall, purchased by a railway company for the purposes of its undertaking, was a "mineral" excepted from the conveyance by virtue of s. 77 of the Railways Clauses Consolidation Act, 1845.

The defendant Viscount Clifden claimed to be entitled to the minerals under the land in question, and had granted to his co-defendants, the Carpalla United China Clay Company, licence to work, mine, and search for china clay thereunder.

The plaintiffs originally commenced a separate action for an injunction against each defendant, but on Viscount Clifden's suggestion the action against him was stayed, and he was joined as defendant in this action.

The trial of the action, which was one of great complication

(1) [1909] 1 Ch. 218.

EVE J.
1909
GREAT WESTERN RAILWAY v. CARPALLA UNITED CHINA CLAY COMPANY, LIMITED (No. 2).

and difficulty, occupied nine days. The plaintiffs employed two leading and two junior counsel, the defendant company one leading and one junior counsel, and the defendant Viscount Clifden two leading and one junior counsel. The plaintiffs called six witnesses, five of whom were scientists of eminence, including three geologists, two petrologists, and one chemist. The defendant Viscount Clifden's witnesses included two scientific and three commercial witnesses, who were called, and he had three other scientific witnesses in reserve, namely, Professor Cox, a mining engineer, Professor Kitto, the county analyst, and Mr. Beringer, a mineral chemist, all of whom had inspected the locus in quo, but although present at the trial were not called. There were 110 exhibits, including many specimens and chemical analyses, requiring and receiving close attention and examination.

The action was ultimately dismissed with costs, the judge certifying for costs on the higher scale.

On taxation the taxing Master disallowed Viscount Clifden the costs of a third counsel. He also disallowed the costs in respect of Professor Kitto and Mr. Beringer in toto and allowed only the costs of Professor Cox's attendance in Court as a witness, disallowing his qualifying fee of 105*l*. In consequence of the disallowance of a third counsel the fees of the second counsel had been increased.

The defendant Viscount Clifden took objection to the disallowances, and in his answers to those objections the taxing Master said: "I have given the question of the allowance of a third counsel in this case great and careful consideration, and have heard arguments of considerable length and force on behalf of both parties on the subject. I have come to the conclusion that there are not such special complications in the case as justify such allowance on a party and party taxation: see *Peel* v. *London and North Western Ry. Co.* (1); *Attorney-General* v. *Birmingham Drainage Board.* (2) The witnesses allowed by me are eight only in number, and these were not all called. The other defendants, the Carpalla Company, are the lessees of the defendant Viscount Clifden, and, their interests being almost identical with his, they acted in combination in defending the

(1) [1907] 1 Ch. 607.

(2) (1908) 52 Sol. J. 855.

action, and two counsel are allowed in the costs of the defendant company. The fact that the judge at the hearing has given costs on the higher scale always has weight in favour of the contention for the allowance of three counsel, but it does not, I think, go so far as to amount to an intimation that such an allowance should be made. In a judgment recently before me the judge gave costs on the higher scale, but at the same time refused to give a direction that three counsel should be allowed. In this case I have taken into consideration the allowance of costs on the higher scale in arriving at the conclusion not to allow for the third counsel. I have also carefully considered the question of witnesses and the arguments of both parties on it. Of the witnesses mentioned in these objections I have allowed Professor Cox in part, and I have allowed seven other witnesses, and in the bill of the defendant company I have allowed two witnesses. I do not think I should allow further uncalled witnesses on this party and party taxation."

The defendant Viscount Clifden now asked that his objections might be allowed.

Upjohn, K.C., and *Christopher James*, for the applicant. We submit that this was undoubtedly a case for three counsel. The taxing Master says that in effect he has allowed the defendants four counsel, namely, two to each set of defendants. But that is a fallacious view to take. It was at Lord Clifden's suggestion that the action against him was stayed, and he was joined as co-defendant in this action, but it was not reasonable to ask him to rely on the mode in which the case would be conducted by his co-defendants. He had much greater interests to protect, having some 150 to 200 acres of china clay works in Cornwall. The defendant company only had this one mine, so far as Lord Clifden knew, and they might have come to some arrangement with the plaintiffs. He did not know what line of defence they were going to take.

The test is whether the costs were "necessary or proper for the attainment of justice, and for defending the rights of any party": Order LXV., r. 27, sub-r. 29. There is no suggestion of negligence or mistake, but the question is whether the

EVE J.
1909
GREAT WESTERN RAILWAY v. CARPALLA UNITED CHINA CLAY COMPANY, LIMITED (No. 2).

costs were necessary or proper for defending Lord Clifden's rights, or whether they were incurred through over-caution. By sub-r. 38 the taxing Master has to take into consideration "the nature and importance of the cause or matter, the amount involved, the interest of the parties," &c. Fry J.'s observations in *Kirkwood* v. *Webster* (1) apply here. Your Lordship disallowed the costs of a third counsel in *Attorney-General* v. *Birmingham Drainage Board* (2), but that was the ordinary case of nuisance by pollution and is altogether distinguishable from this case.

Parker J. dealt fully with the question and authorities in *Peel* v. *London and North Western Ry. Co.* (3), and all the elements necessary to support a case for the allowance of three counsel to which his Lordship there referred are to be found in this present case.

We submit that it was necessary for Lord Clifden as a prudent person, in endeavouring to get justice, but without undue expenditure of money, to employ three counsel.

With regard to the witnesses whose costs were disallowed, all three gave considerable assistance during the trial, although they were not eventually called. Their proofs were briefed and did not merely reiterate the same evidence. Professor Cox went down to Cornwall and examined the mine, and unless he had done so his help would not have been so valuable as it was. Both Professors Cox and Kitto were very material and relevant witnesses, and we submit that these costs should be allowed. The fact that a witness is not called is no ground for disallowing his costs: *London, Chatham, and Dover Ry. Co.* v. *South Eastern Ry. Co.* (4) The taxing Master has given no reasons for disallowing these costs.

P. O. Lawrence, K.C., and *Howard Wright*, for the plaintiffs. The Court will hesitate to interfere with the discretion of the taxing Master, even when the objection relates to the employment of a third counsel. In this case there is the important element that the two co-defendants were defending in the same interest. It is not germane to consider that Lord Clifden was

(1) (1878) 9 Ch. D. 239, 241.
(2) 52 Sol. J. 855.
(3) [1907] 1 Ch. 607.
(4) (1889) 60 L. T. 753.

thinking of his other china clay properties. A corresponding argument might be used on behalf of the railway company. These co-defendants were acting in concert throughout the proceedings; and they had four counsel between them quite apart from the third counsel disallowed.

In *Denaby and Cadeby Main Collieries, Ld.* v. *Yorkshire Miners' Association* (1) the Court of Appeal would not interfere with the discretion of the taxing Master in disallowing three counsel, and the observations in that case are not trenched upon by Parker J.'s decision in *Peel* v. *London and North Western Ry. Co.* (2) Three counsel were disallowed in *Attorney-General* v. *Birmingham Drainage Board* (3), *Glamorganshire County Council* v. *Great Western Ry. Co.* (4), and *Smith* v. *Buller*. (5) In the last-mentioned case the trial took eleven days and the documents amounted to over 2000 folios. All those were heavy cases. The taxing Master also took into consideration the fact that costs were given on the higher scale.

The taxing Master has disallowed the witnesses, not because they were not called, but because he has gone through the whole matter and come to the conclusion that the eight witnesses allowed were sufficient. The number of witnesses is a pure question of discretion for the taxing Master, and the Court will not interfere unless in the clearest possible way it is proved that he has acted on a wrong principle. The taxing Master constitutes an impartial tribunal for the taxation of costs, and he is none the less suitable because he has not tried the action.

EVE J. This matter comes before me on a summons to review the certificate of the taxing Master on two points—first, as to the disallowance of the charge for fees to a third counsel, and, secondly, as to the disallowance of certain fees charged in respect of witnesses of position who were present at the trial but who were not in fact called.

The case, I have no hesitation in saying, was one of great complication and great difficulty, a case which, certainly from

(1) (1907) 23 Times L. R. 635.
(2) [1907] 1 Ch. 607.
(3) 52 Sol. J. 855.
(4) [1895] 1 Q. B. 21.
(5) (1875) L. R. 19 Eq. 473.

EVE J.
1909
GREAT WESTERN RAILWAY v. CARPALLA UNITED CHINA CLAY COMPANY, LIMITED (No. 2).

my point of view, imposed a large amount of labour on those getting it ready for trial and a large amount of labour and heavy responsibility on those conducting it at the trial. I think I may adopt Mr. Lawrence's argument that in determining whether or not three counsel ought to be allowed in the case I ought, as far as possible, to shut my eyes to the fact that the result of this case would have an important bearing upon the property and the financial position of the litigants in respect to other matters. Therefore in the observations I am about to make I confine myself to the claim by the Great Western Railway Company to be entitled to this valuable bed of china clay the particular subject-matter of the action. That claim raised complicated questions of fact and of law: the facts involved inquiries into more than one realm of science. First of all there had to be considered the geological character of the substance which was the subject-matter in dispute, but the actual nature of that substance was not, as some parties to the litigation conceived, to be determined merely by a geological examination. In this connection two other matters of great importance had to be considered; the first was the circumstances in and the agencies by which that substance had been produced, and a variety of theories was put forward, supported by very eminent scientists, as to those circumstances and agencies. Upon the view which the Court took of those theories the question might ultimately have been determined, because it might have been that such agencies had been called into force in producing this substance as would undoubtedly have constituted the resulting substance a mineral. The other matter which had to be considered was whether the substance when reduced into the commodity which constitutes commercial china clay retained any and, if any, what elements that went to constitute it a mineral. Obviously that last point involved an investigation not only of the geological information which had to be obtained as to its original formation and of the agencies which had converted it into what it was, but an investigation into the commercial constituents, first of the raw material and then of the finished article. I cannot myself imagine a case in which any litigant, entering upon an inquiry of that kind which had to be conducted before a tribunal not

used to dealing with matters of that sort, could be expected to embark on that inquiry without calling to his assistance, and prudently and properly calling to his assistance, the best advocates he could obtain and a sufficiency of them to enable him efficiently to conduct a case involving all those different points and different scientific inquiries. Mr. Lawrence is right in saying it is possibly better that the question of what should be allowed in matters of taxation should be left to a tribunal which has not had the case conducted before it rather than to the tribunal which has in fact heard it. I think I may almost say in ninety-nine cases out of a hundred that is probably true. After a case has been conducted before him a judge may have an exaggerated view of the services of that side which has assisted the Court in arriving at a particular conclusion, and possibly an unfairly minimized view of the value of the services of the other ; therefore in all questions that have to do with the conduct of the case—the preparation of the case for trial—it is probably true that the matter is better dealt with in the taxing office than by the tribunal which heard the case. But I do not think that necessarily obtains where the question is how the case ought to have been conducted in Court. At least, the conclusion I draw is that the judge who hears the case, who sees and knows the difficulties that arise in the conduct of it, must be better able to appreciate whether either party was justified in a particular course than any one else, however experienced, who has not had the general experience of the way in which matters are conducted in Court or the special experience of the particular case. I take the statement with which Vaughan Williams L.J. commences his judgment in *Denaby and Cadeby Main Collieries, Ld.* v. *Yorkshire Miners' Association* (1) to which Mr. Lawrence referred me, only turning it round. He said in that case that if he had been in the taxing office he would most certainly not have allowed three counsel, because in his opinion three counsel were not necessary. I only say that if in this case I had been in the position of the taxing Master I should most certainly have allowed three counsel, and, that being the view from which I approach it, the question is whether the taxing Master has satisfied me that

(1) 23 Times L. R. 635.

EVE J.
1909
GREAT WESTERN RAILWAY v. CARPALLA UNITED CHINA CLAY COMPANY, LIMITED (No. 2).

I ought not now to review his finding. The way he puts it is this. He says: "I have come to the conclusion that there are not such special complications in the case as justify such allowance on a party and party taxation." As I say, I believe I am more competent to form an opinion on that than the taxing Master. I have come to a very different conclusion; in my opinion there were such special complications in the case as to justify the retention of three counsel.

Then he says: "The witnesses allowed by me are eight only in number and these were not all called." I do not think the numerical strength of the witnesses is really of importance, for you may have a large number of witnesses whose evidence in chief or cross-examination presents no difficulty, but on the other hand you may have one or two that merit such attention as to make the examination in chief, to say nothing of the cross-examination, of them a matter of great difficulty. Then he goes on: "The other defendants, the Carpalla Company, are the lessees of the defendant Viscount Clifden, and, their interests being almost identical with his, they acted in combination in defending the action, and two counsel are allowed in the costs of the defendant company." That really is the point on which I think the taxing Master proceeded. The action was brought originally against the Carpalla Company alone. At or about the same time another action claiming similar relief was brought against Viscount Clifden. It was thought undesirable that the two actions should proceed side by side, and, very wisely, one action was stayed and Viscount Clifden was added as defendant in the action brought against the Carpalla Company. Viscount Clifden was in a difficult position. Here was an attempt by the railway company to assert a claim which would affect him to a very large extent in the particular action and to a larger extent outside the action; and what he had to consider was, ought he to leave himself practically in the hands of the defendant company, or ought he to fight his action independently? The company had chosen to bring two sets of defendants before the Court, and I think they must put up with the consequences, if either of those defendants says "I choose to fight my own battle; I choose to rely on my own solicitor and counsel; although I am

quite willing to avail myself of the assistance of the other counsel and the other solicitors engaged in the litigation, I am not going to run the risk of finding, while I am endeavouring to prove my own case with their assistance, that I am leaving something undone in my own interest." I think it was open to him to say, "Availing myself of the assistance of my co-defendants, I still will fight my own battle, and will go into this contest, and carry it through on my own responsibility alone." If so, why should I take into account the fact that other defendants, whose interests up to a certain point are the same as Viscount Clifden's, also thought that they would take that course. It appears to me to be the duty of each defendant to fight his own case, and if he once determines to do so I do not see, because other defendants do their duty by themselves, that he should be deprived of any advantages to which he would be entitled if he were a sole defendant. I do not myself think that the fact that the Carpalla Company were looking after themselves in fighting this battle was any ground for suggesting that Viscount Clifden was bound to proceed without making all those preparations which he would have been justified in making had he been sole defendant.

In those circumstances, and holding as I do a very strong view as to the difficulty of the case, I have come to the conclusion, so far as the first part of the summons is concerned, that I must review the Master's finding. It will be necessary to send the matter back to the Master, because I am told that consequent upon disallowing the fee of the third counsel alterations have been introduced into the fees which were allowed for the second counsel. It is obvious that condition of things was only brought about on the footing that the taxing Master's certificate was accepted. If it is not accepted, and is reviewed, I must send the matter back to the Master on the first objection, with an intimation that, in my opinion, the case is one where the fees of the third counsel ought to be allowed on a party and party taxation.

The other matter to which exception is taken is this. The case was launched on the footing that the china clay which underlay the railway company's property constituted part of the soil or

EVE J. 1909 GREAT WESTERN RAILWAY v. CARPALLA UNITED CHINA CLAY COMPANY, LIMITED (No. 2).

subsoil of the district, and was not a mineral within the Railways Clauses Consolidation Act. The way in which the company, or the manner in which the company, was going to support that allegation was not known and could not be known to the defendants, and it was necessary, therefore, and I take it that the defendant Viscount Clifden was so advised, to have in attendance witnesses who would deal with the case from the various points of view which I have indicated, and with the possible arguments to be put forth on behalf of the railway company, that is to say, from the point of view of the geologist, mineralogist, and chemist, and possibly the mining engineer. The company having called their witnesses in fact supported their case by the engineer of the company, by three eminent geologists, two petrologists, and one chemist. The defendant Viscount Clifden called Professor Gregory, who was a mineralogist, and Mr. Marshall, the chemist, and, possibly because the departure of those two gentlemen from the box had left on the mind of those advising the defendants the impression that they had given evidence which was extremely difficult to refute, counsel on behalf of the defendant came to the conclusion that it would not be necessary to call the other three witnesses who were in attendance, and whose services counsel informed me to-day had been of assistance. Those gentlemen were Mr. Beringer, who came from the locality, the head of the School of Minerals at Camborne, Professor Cox, and Professor Kitto, the latter the county analyst, a man extremely well acquainted with the nature of the china clay rock formation. The learned Master has allowed some twenty-five guineas for Professor Cox attending in Court, but he has disallowed the 100 guineas which Professor Cox charged for going down and inspecting the locus in quo and disallowed altogether the amounts paid to Mr. Beringer and Professor Kitto. His reasons are these. He says he has carefully considered the question of the witnesses and the arguments of both parties. "I have allowed Professor Cox in part, and I have allowed seven other witnesses, and in the bill of the defendant company I have allowed two witnesses. I do not think I should allow further uncalled witnesses on this party and party taxation." With all respect to the learned Master it is very difficult, I

find, to extract from that answer what was or what were his reason or reasons for disallowing the costs incurred in respect of these three gentlemen. Obviously it could not have been merely because they were not called, for the result of a practice of disallowing witnesses merely because they are not called might be to bring about an appalling waste of public time. It could not have been, I think, because there were so many witnesses, for he alludes to the fact that there were only eight witnesses called, and counsel, who had an opportunity of seeing and who is well acquainted with the proofs of these gentlemen, assures me their proofs were not directed merely to dealing with matters already dealt with by the other two.

In those circumstances it seems to me that before I deal with this matter I ought to obtain from the learned Master a further statement of the reasons why he disallows the charges in respect of these three witnesses. I send that part of the summons back to the Master with an intimation that I shall be obliged if he will tell me in each case the reason or the reasons which operated in his mind in disallowing the amounts which he has in fact disallowed in respect of those witnesses.

The summons came on again upon July 27.

In his further answers the taxing Master said: "I did not allow Mr. Beringer and Professor Kitto as I considered their evidence as shewn by their proofs was substantially covered by the evidence of the witnesses I had allowed. Professor Gregory went fully into the formation of china clay. Professor Cox into formation and chemical analysis. Professor Marshall into the chemical analysis. Mr. Coon formation and analysis, and the others formation and local knowledge. These are the only reasons for my disallowances. Professor Cox I allowed attendance as witness, and not his fee for qualifying, on the ground that I had altogether allowed qualifying fees to six witnesses."

Upjohn, K.C., and *Christopher James*, for the defendant Viscount Clifden. It is not consistent to allow the costs of Professor Cox's attendance in Court and yet refuse to allow the

EVE J. 1909

GREAT WESTERN RAILWAY v. CARPALLA UNITED CHINA CLAY COMPANY, LIMITED (No. 2).

fee for qualifying which alone could make him an effective witness. The other costs are not pressed.

P. O. Lawrence, K.C., and *Howard Wright*, for the plaintiffs. The allowance of the qualifying fee is purely a question for the discretion of the taxing Master, and, unless he has proceeded on an erroneous principle, it would be contrary to the practice to reverse his decision.

EVE J. On the last occasion I sent the summons back so far as it involved the disallowance of the fees of three witnesses to enable the taxing Master to give some more explicit reasons therefor. As I read his further opinion he did not allow the fees for Mr. Beringer and Professor Kitto, thinking, in fact, their evidence was already sufficiently covered by the evidence given by Professor Gregory, Professor Cox, Professor Marshall, and Mr. Coon. On that assumption, he having looked at the proofs of the witnesses, and accepting his view that such was the result of the examination of the proofs, I do not feel myself justified in interfering with his finding so far as relates to the items for Mr. Beringer and Professor Kitto. But I do not quite follow his reason with regard to Professor Cox. As I have already pointed out, he disallows charges with respect to Professor Kitto and Mr. Beringer because of the evidence contained in the proof of Professor Cox. I cannot take it, therefore, that he disallows any items in respect of Professor Cox because his evidence duplicates that of Professor Kitto and Mr. Beringer, as he has already disallowed the last two because of the existence of the evidence of Professor Cox. When he comes to Professor Cox, dealing with him he says, "I allowed attendance as witness"—that is to say, he allowed a fee for his being here day by day in Court—"and not his fee for qualifying," and the ground on which he did not allow the qualifying fee was because he had allowed qualifying fees to six witnesses. I do not think that is sound. It occurs to me that if I am to treat Professor Cox's evidence as of such importance as to obviate the necessity of calling Mr. Beringer and Professor Kitto, I am bound to regard Professor Cox as a necessary witness. Although I am not for a moment saying it is necessary that every scientific

witness called in a case of this sort should view the locus in quo, I am perfectly certain the experience of most of us is that a scientific witness, however eminent, is far more useful to those conducting the case if in fact he has had the advantage of viewing the locus in quo. And when I remember that the point involved in this case was an issue which depended very largely not merely upon the view of the locus in quo, but a careful examination of the adjacent and subjacent and superjacent strata, I cannot help coming to the conclusion that this at all events was a case in which a personal view was almost essential to enable a witness to render such service to counsel as his eminence in his profession would lead counsel to expect of him. In those circumstances I must treat Professor Cox as a necessary witness for all purposes, and as far as his qualifying fee is concerned the certificate must be varied by allowing it. The costs up to the first hearing to be paid by the plaintiffs. No further order as to costs.

Solicitors: *Walker, Martineau & Co.; R. R. Nelson.*

R. M.

EVE J. 1909 July 31.

THOMAS v. UNITED FUTTED COMPANIES OF FRANCE, LIMITED.

[1909 T. 1272.]

Practice—Writ—Service out of the Jurisdiction—"Foreign Company"—Meaning of—Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), ss. 192, 283.

A sale to a foreign company cannot be effected under s. 192 of the Companies (Consolidation) Act, 1908.

In re Irrigation Co. of France, (1877) L. R. 6 Ch. 176, distinguished.

THIS was a motion by the plaintiff, the holder of 100 shares in the defendant company, on behalf of himself and all the shareholders of the defendant company, for an injunction to restrain the defendant company from purporting to confirm or in any way act upon the special resolution or carry out the agreements hereinafter mentioned.

The material facts were as follows:

The defendant company, under the name of the Nantes Butter and Refrigerating Company, Limited, was registered on April 18, 1906, under the Companies Acts, 1862 to 1900, with the object of purchasing certain freehold property, machinery, and plant at Nantes, France. In June, 1907, the defendant company also acquired other land, buildings, plant, and machinery at Issé, France.

By extraordinary resolution in June, 1908, the capital of the defendant company was increased by the creation of 150,000 new ordinary shares of 1*l.* each, and 150,000 further shares were then offered to the shareholders and public, who subscribed for 6000 shares only, leaving the balance of 94,300 to be taken by the underwriters, the Société d'Importations Alimentaires.

In December, 1908, the name of the defendant company was duly altered to that of "The United Butter Companies of France, Limited."

Further working capital being necessary, negotiations were commenced in France in January, 1909, with a view to raising 200,000*l.*, and the persons in France willing to provide the money stipulated that it should be raised through the medium

of a French company to be formed for the purpose of taking over the business of the defendant company as a going concern. The French company so formed was registered in France in April, 1909, under the name of the Union des Beurreries de France.

On July 7, 1909, the defendant company sent out a notice of an extraordinary general meeting to be held on July 16, 1909, for the purpose of considering and passing the following resolutions, namely, (1.) that the defendant company be wound up voluntarily and the secretary appointed liquidator, and (2.) that the draft agreements hereinafter mentioned be approved and the liquidator authorized pursuant to s. 192 of the Companies (Consolidation) Act, 1908, to enter into and carry the same agreements into effect. The confirmatory meeting was to be held on July 31, 1909.

The first draft agreement was expressed to be made between the defendant company and its liquidator of the one part and the Societe d'Importations Alimentaires of the other part, and provided for the transfer to the last-named Société as from May 1, 1909, of all the stock of butter-making material, moneys, credits, debts, and bills of the defendant company (with the exception of land, buildings, plant, and machinery), and, as consideration for the transfer, the Société undertook to discharge all debts, liabilities, and obligations of the defendant company as from May 1, 1909, and indemnify the defendant company and its liquidator against the same.

The second draft agreement was expressed to be made between the defendant company and its liquidator of the one part and the Union des Beurreries de France of the other part, and to be supplemental to the first draft agreement, and provided (inter alia) that in consideration of the delivery to the liquidator of 50,000 ordinary shares to bearer of 100 francs each of the French company, to be distributed by him amongst the members of the defendant company in accordance with their rights and interests, the defendant company and its liquidator should transfer to the French company as from May 1, 1909, all the lands, buildings, concessions, patents, goods, chattels, undertaking, business, and goodwill of the defendant company, and all other its real and

EVE J.
1909
THOMAS
v.
UNITED BUTTER COMPANIES OF FRANCE, LIMITED.

personal property, except that comprised in the first draft agreement.

At the meeting held on July 16, 1909, the resolutions were put to the meeting and declared carried. The plaintiff was present in person and objected to, voted against, and dissented from the resolutions, and subsequently commenced this action on behalf of himself and all the shareholders of the defendant company for a declaration that the second resolution was ultra vires and void, and an injunction to restrain the defendant company from acting upon them.

The motion came on for hearing on July 31, the last day of the Trinity sittings.

P. O. Lawrence, K.C., and *Beebee*, for the plaintiff. We submit that the second resolution is ultra vires. The point turns upon the construction of the Companies (Consolidation) Act, 1908. Sect. 285 says definitely what the meaning of the word "company" is to be in the new Act. This is a new consolidating Act, repealing all the earlier Acts, and the pre-existing law cannot be taken into account in construing the new Act: *Bank of England* v. *Vagliano Brothers* (1); *Bradlaugh* v. *Clarke* (2); Maxwell on the Interpretation of Statutes, 3rd ed. p. 35. The Act of 1862 did not contain an interpretation section. The first definition of "company" is to be found in s. 30 of the Act of 1900, and that was long subsequent to *In re Irrigation Co. of France* (3), deciding that a transfer under s. 161 of the Act of 1862 to a foreign company could be made. Apart from that decision, would any one say that the word "company" in s. 192 of the new Act meant one thing in one place and a different thing in another? The words "transferor company" and "transferee company" are new words, and it is not permissible to go behind the Act and look at the old law. The fact that the words "shares, policies, or other like interests" are used in connection with "transferee company" do not necessitate anything inconsistent with the definition of the word "company."

Jessel, K.C., and *B. A. Hall*, for the defendant company. The

(1) [1891] A. C. 107, 145. (2) (1883) 8 App. Cas. 354, 381.
(3) L. R. 6 Ch. 176.

Act of 1908 is a consolidating Act and has not altered the law. It reproduces the words of the Act of 1862 on which judicial interpretation has been placed by the decision in *In re Irrigation Co. of France*. (1) The definition clause is not new. It was contained in s. 30 of the Act of 1900, and that Act forms a complete code with the Act of 1862 and intermediate Acts, and the word "company" must be regarded as being used in the same sense throughout the code and as including a foreign company: *In re Irrigation Co. of France*. (1) The contrary would lead to absurdity; for instance, in the case of a foreign company being wound up under the earlier Acts s. 26 of the Act of 1900 would not apply.

In *Bank of England* v. *Vagliano Brothers* (2) the House of Lords were dealing with a codifying, not an amending and consolidating, Act. In construing the latter it is permissible to look at the earlier Acts: *In re Budgett* (3); *Dale's Case* (4); *Mitchell* v. *Simpson* (5); *Greaves* v. *Tofield*. (6)

EVE J. I feel regret that I should have to decide this question, which strikes me as one of difficulty and certainly as one of novelty, on the last day the Courts are sitting. If this had come before me on an ordinary motion day, when the party against whom I am about to decide would have had an opportunity of immediately going to the Court of Appeal, I should have felt less reluctance than I do now in making the order, because I cannot help seeing that the effect of the order that I am about to make may be to inflict great loss upon the absent shareholders. But at the same time, having arrived at a conclusion upon the matter, I think it is my duty to express it and to embody the result in the judgment.

The question arises in this way. The defendant company has been formed for the purpose of carrying on, and has been carrying on, a business in France. The main assets of the company are there situate, and in order to continue to carry on that business it has become necessary to raise further capital. A

(1) L. R. 6 Ch. 176.
(2) [1891] A. C. 107, 145.
(3) [1894] 2 Ch. 557, 561.
(4) (1881) 6 Q. B. D. 376, 453.
(5) (1890) 25 Q. B. D. 183, 190.
(6) (1880) 14 Ch. D. 563.

EVE J. 1909 THOMAS v. UNITED BUTTER COMPANIES OF FRANCE, LIMITED.

gallant effort was made to raise the capital in this country, with the result that the response was altogether inadequate and the company's effort proved entirely abortive. In those circumstances recourse was had to persons more intimately acquainted with the company's business in France, with the result that there have been found persons in France who are prepared to put the company in funds in order that the undertaking may be given a chance which those who believe in it believe it alone wants in order to prove a success. But, not unnaturally, the individuals in France who are prepared to find the capital stipulate that the capital should be subscribed and its administration should be committed to a corporation the domicil of which is in France. That seems to me to be a perfectly reasonable and intelligible stipulation, and when the English company comes to consider how that desire or rather that condition imposed by the French capitalists can be given effect to they are driven to this, that the only way in which it can be given effect to is by winding up the English company and by selling the assets of the English company to the French corporation. But inasmuch as the capitalists in France, though willing to find capital for the carrying on of the business, are not prepared to find in cash the additional capital required for purchasing the assets, the transaction necessarily assumes this shape, that so far as the purchase of the assets is concerned the consideration must be represented by shares in the capital of the new French company; and accordingly the proposal is to proceed under s. 192 of the Act of 1908, to wind up the English company, and to authorize the liquidator to sell its assets to the new French company in consideration of shares issued by the French company, or to be issued by the French company, to the liquidator of the English company or his nominees. The arrangement has reached this stage, that a first meeting of the English company has been held, at which has been passed the resolution, or the first branch of the resolution, putting the company into voluntary liquidation, and the first branch of a special resolution authorizing the liquidator, when the voluntary liquidation is constituted, to enter into the necessary agreement to give effect to the arrangements I have indicated.

Now there are amongst the shareholders of the English

company certain dissatisfied and dissentient shareholders, and one of them, the plaintiff in this action, has commenced this action by which, suing on behalf of himself and all other the dissentient shareholders in the defendant company, he claims an injunction to restrain the defendant company from carrying out those arrangements. He bases his claim for relief upon the allegation that the sale of the assets in a liquidation to a foreign company for shares in that foreign company is a transaction which, as the law now stands, is ultra vires of the selling company. The validity or invalidity of that allegation depends upon the true construction of the statute now regulating joint stock companies in this country, the Companies (Consolidation) Act of 1908. Sect. 192 of that Act reproduces, for all practical purposes, the exact terms of ss. 161 and 162 of the Act of 1862, and if the matter stood there, having regard to the judicial interpretation which was put upon the words of s. 161, I should hold that a sale to a foreign company by an English company registered under the Act of 1862, in liquidation, for shares in the foreign company was intra vires of the English company. The matter so far as I am concerned is settled, and abundantly settled, by the authority of *In re Irrigation Co. of France*. (1) But it is said on behalf of the plaintiff that in the Consolidation Act of 1908 there is a section which is not to be found in the Act of 1862, and a provision which, so far as the catena of Acts regulating joint stock companies is concerned, was first introduced into those Acts by the Act of 1900. It is a section contained in the part of the Act headed "Interpretation, &c.," and is in fact the interpretation section in the Act, s. 285, whereby it is provided that "in this Act, unless the context otherwise requires, the following expressions have the meanings hereby assigned to them (that is to say):—'Existing company' means a company formed and registered under the Joint Stock Companies Acts, or under the Companies Act, 1862; 'Company' means a company formed and registered under this Act, or an existing company." Now on behalf of the plaintiff it is said, take that interpretation clause, transpose it to s. 192, and indicate, if it be possible, what there is in the context of s. 192 which requires that the company in that

(1) L. R. 6 Ch. 176.

EVE J.
1909
THOMAS
v.
UNITED
BUTTER
COMPANIES
OF FRANCE,
LIMITED.

section referred to as the "transferee company" is a company differing from the company which in the same section more than once is referred to as the "transferor company." At first sight I was inclined to think that the terms in which the consideration is spoken of in s. 192 might afford a context requiring another interpretation of the word "company" when dealing with "transferee company" as distinct from "transferor company." It there speaks of the compensation for the transfer or sale being made up of shares, policies, or other like interests in the transferee company, but I am satisfied, from Mr. Lawrence's argument and what he and Mr. Beebee have said, that I ought not to treat those words (although if the interpretation clause had said "unless the context otherwise admits or requires" they might have been sufficient to admit a contrary interpretation of the word "company") as amounting to a context "otherwise requiring." It seems to me that in controlling the primary meaning of the word "company" by context I must be satisfied that the context is such as requires me to put upon the word "company" a different meaning from that which according to the interpretation section it ought to bear.

The net result is that on the Act of 1908 I come to the conclusion that there is nothing in the context in s. 192 which entitles me or which in fact requires me to put a different interpretation upon the word "company" when preceded by the word "transferee" than I do upon the same word when preceded by the word "transferor," and on the Act of 1908 as it stands I should as a matter of construction come to the conclusion that in both instances, both as transferor and transferee, "company" was bound to be a company formed and registered under the Act of 1908, or under the Joint Stock Companies Acts, or under the Companies Act, 1862, and that on that Act it would be ultra vires of a company registered under the English Act to sell to a company domiciled abroad. But Mr. Jessel has said that although that might be the prima facie conclusion at which the Court would arrive on the construction of the Act of 1908 standing alone, the Court is bound to have regard to the fact that that Act reproduces the exact words of an older statute, upon which words a judicial interpretation has been placed binding upon this

Court. I think the fallacy which underlies that argument is this, that the judicial interpretation upon which he relies was an interpretation placed upon s. 161 in a statute which did not contain the words of definition which are to be found in s. 285. If in the Act of 1862 there had been s. 161 and there had also been a definition clause in the terms or containing the expressions to be found in s. 285 of the Act of 1908, I should have held that the decision in *In re Irrigation Co. of France* (1) determined the construction which I ought to place on s. 192 in the Act of 1908, but I think that the absence from the Act of 1862 of the definition section makes all the difference, and that I am not entitled, in an Act which contains the same words as are to be found in the Act of 1862 but contains the additional clause with regard to the definition, to say that the later Act must necessarily bear the same construction as the earlier Act; and when, as in this case, I have come to the conclusion that looking at the later Act alone I should hold that it did not bear the construction which was put upon the earlier Act, I think I am bound to hold that the interpretation which was put upon the earlier Act was put upon an Act which is not for all purposes in pari materia with the later Act. In those circumstances, but with considerable doubt, and I may add with reluctance, because I regret very much that the matter cannot be reconsidered now for some months, I come to the conclusion that I must grant an injunction restraining the company from acting upon the resolution which contemplates the execution and carrying into effect of the agreements referred to in the latter part of the notice convening the meeting which is to be held to-day.

Solicitors: *Hatchett Jones, Bisgood & Marshall, for Shirley Smith & Malins, Birmingham; H. A. Graham & Wigley.*

(1) L. R. 6 Ch. 176.

R. M.

C. A.
1909
May 10, 11; July 12, 30.

In re PEARCE.

[1908 P. 092.]

Bankruptcy—Adjudication—Secured Creditors—Separate Securities—Proof—Lumping Debts and Securities—Aggregate Assessed Value—Shares in Ships—Vendor's Lien—Admission of Proof—Redemption of One of the Securities—Life Policies—Payment of Premiums from Date of Receiving Order—Salvage—Interest.

P. was adjudicated bankrupt in August, 1899. B. K. & Co., who had various debts and various securities, sent in their proof as secured creditors, lumping together their debts and securities and claiming to prove for the balance. The securities consisted of (1.) a vendor's lien on ship shares, and (2.) a mortgage of policies, a debt, and freeholds. The trustee asked for details of value, and (1.) was assessed at 1325*l.*, and the property in (2.) at 2481*l.*, making in the aggregate 3806*l.* The trustee, however, did not object to the proof being made for a lump sum, nor did he require the separate values of the securities to be assessed in the proof, but he admitted the proof to rank for the amount claimed less 3806*l.*, the aggregate assessed value of the securities. Subsequently a scheme for a composition was approved, and on payment of the composition the bankruptcy was annulled and the outstanding estate of P. was ordered to revest in him. A subsequent incumbrancer on the freeholds included in mortgage (2.) having claimed to redeem, B. K. & Co. contended that redemption could now only be obtained on payment of the full sum of 3806*l.* :—

Held (reversing the decision of Warrington J.), that the trustee in bankruptcy could not, by accepting the securities as worth the aggregate sum assessed, confer upon the secured creditor any part of the bankrupt's property to which the secured creditor was not entitled, or compel a mortgagee to put a separate value on two different properties included in the same security, and that mortgage (2.) could be redeemed for 2481*l.* after allowing for what had already been received by the mortgagees on this security. *Pearce* v. *Bullard, King & Co.*, [1908] 1 Ch. 780, overruled on this point.

But *held* also that B. K. & Co. were entitled to be repaid all premiums paid by them on the life policies from the date of the receiving order with interest from the same date.

Appeal from a decision of Warrington J.

By a mortgage of December 24, 1898, a policy in the Lancashire Insurance Company, a policy in the Sceptre Life Association, Limited, debts due from Messrs. Pearce, Sharpe & Co. to Henry Pearce, and freeholds at Ipplepen, in Devonshire, then

subject to a prior mortgage, were assigned and conveyed by the said Henry Pearce to Messrs. Bullard, King & Co. to secure a guarantee which they had given to Henry Pearce's bankers. This deed contained a proviso that notwithstanding s. 17 of the Conveyancing and Law of Property Act, 1881, the said Henry Pearce should not be entitled to redeem that mortgage without at the same time redeeming any existing or future mortgage held by Bullard, King & Co. on other property belonging to the mortgagor, or to redeem any other such mortgage without at the same time redeeming that present mortgage.

On April 19, 1899, a receiving order was made against Pearce, and on August 26, 1899, he was adjudicated bankrupt. On May 1, 1900, Bullard, King & Co. sent in their affidavit of proof, lumping together their various debts and various securities, and stating that they valued their securities at 3806*l.* 15*s.* The total indebtedness was in the first instance fixed at 8206*l.*, but was subsequently settled at 6497*l.* odd.

On May 10, 1900, the trustee wrote to Bullard, King & Co.'s solicitor as follows: "As to your assessment of the value of the securities held by you, viz.: 3806*l.* 15*s.* 0*d.*, I shall be obliged if you will give me details of the value of the respective securities which you hold under the various documents mentioned in your proof, and also the separate values of each of the steamship shares in respect of which your clients claim a vendor's lien. Perhaps you will also indicate how you propose to allocate the respective securities in respect of the three items shewn in your 'summary of balances' due."

On May 22 the following reply was sent:—"With reference to the sum of 3806*l.* 15*s.* 0*d.* at which my clients value their entire security, the amount is apportioned as follows—Sceptre policy 5*l.*, Lancashire life policy 200*l.*"—shares in the three shipping companies (giving details), altogether 1325*l.*—"Devonshire property and Pearce, Sharpe & Co. 2276*l.* 15*s.* 0*d.*" This statement was acquiesced in by the trustee, and he did not require, and the creditors did not volunteer, to go through the form of amending the proof to make it accord with the statement which the trustee had asked for, and in July following he

C. A. 1909

PEARCE, *In re.*

admitted the proof to rank for 2691*l.* odd, being 6497*l.* less 3806*l.* 15*s.*, the assessed value of the securities.

On February 1, 1901, a composition of 12*s.* in the pound was accepted and approved, and shortly afterwards the trustee, out of moneys received from the debt from Pearce, Sharpe & Co. (which realized much more than was expected), paid Bullard, King & Co. 2276*l.* 15*s.*, and he also paid them their dividend of 12*s.* in the pound on the 2691*l.*, the unsecured balance of their debt.

In March, 1901, the receiving order was rescinded and the bankruptcy annulled, and an order was made revesting his property in Pearce.

In 1904 Pearce created certain further charges on the Devonshire property and again became bankrupt. In 1908 the Devonshire freeholds were sold by the prior mortgagee and the balance of the proceeds of sale paid into Court under the Trustee Act, 1893. A subsequent mortgagee now claimed an account of what was due to Bullard, King & Co. on the said mortgage of December 24, 1898, and redemption.

Warrington J., following the decision of Joyce J. in *Pearce* v. *Bullard, King & Co.* (1), held that by virtue of the proceedings in bankruptcy and the composition and subsequent bankruptcy Bullard, King & Co. were entitled to hold the steamship shares and the policies and Devonshire property comprised in the mortgage of December 24, 1898, as security for the principal sum of 3806*l.* 15*s.*, the amount at which they valued their several securities in the aggregate in their proof.

The subsequent mortgagee appealed.

Cave, K.C., and *G. Henderson*, for the appellant. We desire to redeem the mortgage of December 24, 1898, to the exclusion of the 1325*l.* alleged to be secured by the lien on the steamship shares. As to these shares in the steamships, Bullard, King & Co. are not, strictly speaking, secured creditors: *Ex parte Clarke* (2); therefore as regards these shares there was no secured debt, much less a mortgage, and nothing that could have been consolidated with the mortgage of December 24, 1898. Each debt ought to have been specified in the original proof and

(1) [1908] 1 Ch. 780. (2) (1892) 67 L. T. 465.

the value of the respective securities separately assessed: *In re Smith and Logan* (1); *In re Morris.* (2) The lumping together of the securities, as was done in this case, though convenient, cannot alter the rights of the secured and unsecured creditors, and the trustee in bankruptcy cannot in this way confer upon a secured creditor part of the bankrupt's property to which the secured creditor is not entitled. By the letter of May 22, 1900, Bullard, King & Co. did separately assess their various securities, and they fixed 2276*l.* 15*s.* as the value of the debt from Pearce, Sharpe & Co. and this Devonshire property together: they have been paid 2276*l.* 15*s.* in respect of this particular security, so that practically nothing is now due to them on this Devonshire property. They have also received something from proceeds of sale of the policies. Warrington J. considered himself bound by *Pearce* v. *Bullard, King & Co.* (3), but that decision is wrong, and, further, the present appellant was not a party to it.

Rowden, K.C., and *T. L. Wilkinson*, for Bullard, King & Co., the respondents. By virtue of the proceedings in bankruptcy the mortgage of December 24, 1898, can only now be redeemed for the aggregate assessed value of the securities, that is, 3806*l.* 15*s.* There was also a right to consolidate these two securities by virtue of the proviso at the end of the mortgage of December 24, 1898, excluding the operation of s. 17 of the Conveyancing Act, 1881, and by the special wording of this proviso. [After some discussion the claim to consolidate the lien on the steamship shares with the mortgage by virtue of this particular proviso was abandoned.] On the form of the proof, as accepted by the trustee, the aggregate sum of 3806*l.* 15*s.* is the only sum for which the securities can be redeemed.

The letter of May 22, 1900, does not amount to separate assessment or a separate valuation in accordance with the Bankruptcy Rules, which must be strictly complied with: *In re Vautin.* (4) Rule 11 is clear, under which the proof for a lump sum was made. The trustee did not require a separate assessment to be made or a fresh proof to be put in, as he might have

(1) (1895) 2 Man. 70.
(2) [1898] 2 Ch. 413; [1899] 1 Ch. 485.
(3) [1908] 1 Ch. 780.
(4) [1899] 2 Q. B. 549.

C. A. 1909

PEARCE, *In re.*

done, but he accepted the proof for the lump sum. The appellant therefore cannot redeem one security without redeeming the whole, and the whole can only be redeemed for the aggregate assessed value. The decision on this point in *Pearce* v. *Bullard, King & Co.* (1) is correct.

G. Henderson, in reply.

COZENS-HARDY M.R., after referring to the fact that the agreement as to the effect of the consolidation clause in the mortgage of December 24, 1898, had been very properly abandoned, and having stated the facts in some detail, continued:—It is contended—and the learned judge below has taken this view—that the effect of the transaction between Bullard, King & Co. and Pearce's trustee in bankruptcy in May, 1900, and the subsequent proceedings was to give to Bullard, King & Co. a security to which it is conceded they were not entitled but for the proceedings in bankruptcy. I certainly shall not be the first to sanction the view that it is competent for a trustee in bankruptcy to give away from the unsecured creditors and to confer upon a secured creditor part of the bankrupt's property to which the secured creditor is not entitled. I do not think the trustee ever contemplated doing that, and I therefore think that the claim which has been given effect to by the order under appeal must be wrong. That order declares that by virtue of the proceedings in bankruptcy and the composition and the subsequent bankruptcy the respondents became entitled to hold the shares in the steamships and the policies, debts, and hereditaments included in the mortgage of December 24, 1898, by way of security for the principal sum of 3806*l.* 15*s.*, the amount at which the securities in the aggregate were valued in their proof. That, it seems to me, must be wrong and must be set right. I am, however, unable to adopt the argument of Mr. Cave to its full extent. He says the effect of the two letters of May 10 and 22, 1900, and the acquiescence of the trustee, was that the valuation of the Devonshire property and Pearce, Sharpe & Co.'s debt together was assessed at only 2276*l.* 15*s.*, and that that is the only amount for which credit can be had. I think there is a

(1) [1908] 1 Ch. 780.

fallacy in that. There is no power under the Bankruptcy Act, as I read it, when a security is given upon Blackacre and Whiteacre in one deed, for the trustee to compel the mortgagee to put a separate value upon Blackacre and a separate value upon Whiteacre; it is all one security, although it contains several parcels, and it seems to me the true effect of this letter of May 10, 1900, was this: "We value the property comprised in the mortgage of December 24, 1898, at the aggregate sum of 2481*l.* 15*s.*, that being with the 205*l.* for the policies the aggregate value put upon all the items comprised in that security." That being so, we must have regard to this fact also, that it was a mortgage debt, carrying interest of course; it was a mortgage debt comprising amongst other things policies of assurance in respect of which premiums were payable and in respect of which there would be or might be a lien upon them. It is a security also which has been partly realized, for it was realized so far as Pearce, Sharpe & Co.'s debt was concerned in this very remarkable way. The debt turned out to be much more valuable than was anticipated, and out of what was received from this debt the precise sum mentioned in the letter of May 10, 1900, namely, 2276*l.* 15*s.*, was paid to Bullard, King & Co., the balance being paid to Pearce at the time when a composition was entered into and as a means by which the composition was entered into. I think, therefore, that what we ought to do is to take an account of what is due under the mortgage of December 24, 1898, leaving out of consideration any question of consolidation and simply taking an account of what is due under that mortgage. There will be credited on the one side the interest, of course, on the total debt of 2481*l.* 15*s.* There will be credited on the date when the 2276*l.* 15*s.* was paid that amount—that would be credited as a receipt. When premiums were paid on the policies they would be put on one side of the account, and the money received from the sale of the policies will of course be put on the other side of the account, and the ultimate result, including of course any mortgagee's costs properly incurred in reference to the securities, will shew what, if anything—and as far as I can see there will be something—is due to Bullard, King & Co. in respect of their security of December 24, 1898, and that amount must be paid

C. A. 1909 PEARCE, *In re.*

out of the funds in Court and the balance paid to Mr. Cave's clients, who are the incumbrancers immediately behind. Mr. Cave's clients will have the costs of this appeal, but the other costs will be mortgagee's costs.

BUCKLEY L.J. When in May, 1900, Bullard, King & Co. came in to prove in Pearce's bankruptcy, the effect of what took place is this: Bullard, King & Co. said, "We are creditors for 6497*l.*, but we seek to prove only in respect of 2691*l.*, because we elect to keep and hold certain securities we have and whose value we say is 3806*l.* 15*s.*," so that to the extent of 3806*l.* 15*s.*, part of their debt, they elected to take certain securities in satisfaction; and having taken that 3806*l.* 15*s.* in satisfaction of their debt, they were asked to say on May 10 how they divided it, and they answered by the letter of May 22. I think most exaggerated importance has been attached to that letter. The parcels which were included in the deed of December 24, 1898, were the Lancashire policy, the Sceptre policy, the debt from Pearce, Sharpe & Co., and certain Ipplepen, Devonshire, freeholds. They took upon themselves to divide these parcels, which were all in one deed. Why they did so I do not know. It was quite unnecessary. They said "Sceptre policy 5*l.*, Lancashire policy 200*l.*, Devonshire property and Pearce, Sharpe & Co.'s debt 2276*l.* 15*s.*" If you add those together you find that the aggregate value they attributed to the parcels included in the deed of December 24, 1898, was 2481*l.* 15*s.* Then they also said the shares in the three steamships are worth altogether 1325*l.*, and that is how the balance of our 3806*l.* 15*s.* is made up. They cast those together and they made one aggregate sum. Now the contention was presented to the judge below, and adopted by him, that, for some reasons which I am unable to follow, the creditors were entitled to consolidate their vendor's lien in respect of unpaid purchase-money upon those three steamship shares with the debt which was due in respect of the mortgage of December 24, 1898. There is a clause in this deed allowing the mortgagees to consolidate any mortgage upon other property of the company, but ultimately we were told that that contention would not be raised,

and that argument was dropped. That being so, you have here two securities, the one a vendor's lien and the other a mortgage; their aggregate value was taken to be 3806*l.* 15*s.* What subsequently took place was this: money was received in respect of Pearce, Sharpe & Co.'s debt, which had been supposed not to be worth much, and thereupon the trustee paid to these creditors the estimated figure of 2276*l.* 15*s.* which they placed upon Pearce, Sharpe & Co.'s debt and the Ipplepen freeholds. The result was not to redeem the mortgage of December 24, 1898, because the amount they had attributed to it was 2481*l.* 15*s.* The trustee, if he had tendered them 2481*l.* 15*s.*, would have been entitled to redeem; but he did not; he tendered 2276*l.* 15*s.*, and they took that. Years went on, and in 1903, I think, the other two parcels included in the deed of 1898—the Sceptre policy and the Lancashire policy—were sold by the mortgagees, and they got some money out of those. In that way they received all the proceeds of the parcels included in the deed of 1898 upon the hypothesis that the two parcels, the debt of Pearce, Sharpe & Co. and the Ipplepen freeholds, were worth 2276*l.* 15*s.* and nothing more; and at that stage, and upon those assumptions, that mortgage, it seems to me, was no doubt for all purposes of the bankruptcy redeemed. But in the interval, namely, in March, 1901, the bankruptcy had been annulled and an order made revesting his property in Pearce. In 1904 he created further charges, and the question arises between the original mortgagees and those subsequent mortgagees. In point of fact, the right of the original mortgagees was to keep up the policies by paying the premiums upon them; their interest in respect of the unpaid balance of the 2481*l.* 15*s.* had been running on, and they were entitled to certain sums which they had not been paid; and as to that, I apprehend there must be an account to see what is due in respect of that, and I suppose the contention will be that, as against the balance and the sum produced from Pearce, Sharpe & Co.'s debt and the Ipplepen freeholds, they will be entitled to recover the amount so found due to them in respect of that security. Now it has been contended before us that, somehow or other, a trustee in bankruptcy is entitled to do this: that if a creditor has a

C. A. 1909 PEARCE, *In re.* Buckley L.J.

small debt charged upon a property of large value and has a large debt charged upon property of small value, and has no right to consolidate, the trustee may allow him to prove for one aggregate sum, stating that he holds one aggregate security, and thus give him the benefit of consolidation so as to take the unsecured balance of the large debt out of the surplus value of the security for the small debt. I am not aware of any authority for that proposition; it seems to me an extraordinary one that the trustee should be entitled to create a right in the secured creditor adversely to other creditors for a security which he had not before the date of the bankruptcy. It is only upon that ground that any contention has been raised before us as to the right to consolidate this vendor's lien in respect of the steamship shares, which I think must be wrong. It seems to me that the declaration made below does not work out the true rights of the parties. I think the account must be taken in the way the Master of the Rolls has stated, with the result that an account will be taken which will lead to working out what are the rights of the parties in respect of the security of December 24, 1898.

KENNEDY L.J. The matter has been so fully dealt with, and judgment pronounced in so much detail, that I would only say I agree.

COZENS-HARDY M.R. Though this is an appeal from a decision of Warrington J., it is really an appeal against the decision of Joyce J. in *Pearce* v. *Bullard, King & Co.* (1), which must be taken to be overruled.

July 12. The minutes of the order given out by the registrar in pursuance of this judgment were, so far as material, as follows: "Declare that by virtue of the proceedings in bankruptcy and the composition in the said order mentioned the respondents became entitled to hold the policies of insurance, debts and hereditaments comprised in the indenture of December 24, 1898, as securities for the principal sum of 2481*l.* 15*s.* with

(1) [1908] 1 Ch. 780.

interest thereon at 5*l.* per cent. per annum from July 31, 1900 (the date at which the proof was admitted by the trustee in the bankruptcy)." The following account was then ordered: "(1.) An account of what is due to the respondents under and by virtue of their said securities on the footing of the said declaration including the sums, if any, properly paid by them for premiums on the said policies of insurance respectively since July 31, 1900, with interest thereon at the rate of 5*l.* per cent. per annum."

The respondents, Bullard, King & Co., now moved to vary these minutes "by directing that the premiums on the insurance policies therein mentioned shall be allowed from April 19, 1899, the date of the receiving order, instead of from July 31, 1900, the date of the admission of the proof of debt."

Rowden, K.C., and *T. L. Wilkinson*, for Bullard, King & Co. Between April 19, 1899, and July 31, 1900, the respondents have paid some 200*l.* for premiums on the policies included in this security, payments they were bound to make to save the policies from lapse, and these payments should be allowed in taking the account directed by the judgment. Therefore the date of the receiving order, not the date of the proof, is the proper date from which the account should begin.

Rule 13 of Sched. II. to the Bankruptcy Act, 1883, provides that the valuation and proof may be amended on proof of a bona fide mistake. The rights of a secured creditor are very clearly stated in *Société Générale de Paris* v. *Geen*. (1)

The original mortgagor could not have redeemed this security without repaying the premiums which his mortgagees had to pay to preserve the security, and the subsequent mortgagee can be in no better position. These premiums were in the nature of salvage. Subsequent interest accrued since could not have been proved for: *In re Savin* (2), where the general rule as to proof is stated. [*Quartermaine's Case* (3) was also cited.]

[They were stopped.]

Cave, K.C., and *G. Henderson*, for the subsequent mortgagee.

(1) (1883) 8 App. Cas. 606, 612. (2) (1872) L. R. 7 Ch. 760, 765.
(3) [1892] 1 Ch. 639.

C. A. 1909 PEARCE, *In re.*

The date of proof, July 31, 1900, was accepted by the respondents on the hearing in the Court below, and also in the action of *Pearce* v. *Bullard, King & Co.* (1), as the date from which they were to have credit for any premiums paid on the policies. At that date they valued this security at 2481*l.* 15*s.*, and the Court has held that this security is a security for that amount only.

It is clear that neither the interest accruing after the receiving order nor the premiums paid after that date could be the subject of proof; and if it was intended to include them, the valuation of the security should have been altered. The trustee in bankruptcy could under r. 12 (*a*) of Sched. II. of the Act have redeemed this security at its "assessed value," and the subsequent mortgagee is in the same position as the trustee in bankruptcy. Under r. 11 the value at which the creditor assesses his security must be the value at the date when he assesses it, i.e., at the date of his proof. Therefore no premiums paid between the date of the receiving order and the date of proof ought to be allowed. The trustee in bankruptcy could not have been called upon to pay these premiums had he desired to redeem at the assessed value. In *In re Savin* (2) and in *Quartermaine's Case* (3) the point under discussion was the amount of principal for which the creditor was to hold his security.

Rowden, K.C., in reply. The present question arises not in bankruptcy, but in proceedings in Chancery for redemption, and it is merely a question of the terms on which a subsequent incumbrancer not a trustee in bankruptcy is to be allowed to redeem. These premiums are in the nature of salvage and must be taken into the account on that footing.

Cur. adv. vult.

July 30. COZENS-HARDY M.R. On April 19, 1899, a receiving order was made against Pearce, and in August, 1899, he was adjudicated bankrupt. Bullard, King & Co. were creditors for a large sum, say £($x + y$), in respect of which they held a mortgage of certain property, including policies. They valued their security at £x, and on July 31, 1900, they were admitted to prove for £y,

(1) [1908] 1 Ch. 780. (2) L. R. 7 Ch. 760, 765.
(3) [1892] 1 Ch. 639.

the balance of their debt. The trustee did not redeem. The creditors ultimately accepted a composition, and the bankruptcy was annulled under s. 23, sub-s. 2, and the bankrupt's property was vested in him. He subsequently mortgaged the property comprised in Bullard, King & Co.'s security. The question now arises, not in bankruptcy, but in proceedings in the Chancery Division between Bullard, King & Co. and the subsequent mortgagees, how much the former can claim against the property or the proceeds of sale thereof.

It is admitted that they are entitled to the principal sum (£*x*), with interest thereon at the rate provided in the mortgage deed from July 31, 1900, and premiums paid on the policies after July 31, 1900. They claim, however, to be allowed also premiums paid between April 19, 1899, and July 31, 1900.

Now it is clear that neither the interest accruing after the receiving order nor the premiums paid after that date could be the subject of proof. But that does not dispose of the question. It seems to me that Pearce after the annulment of the bankruptcy was, with reference to the mortgagees, in precisely the same position as if no bankruptcy had taken place, except so far as regards the portion of the mortgage debt (£*y*) which was proved for, and in respect of which a composition was paid. Pearce could not have redeemed the property without repaying the premiums not provable in bankruptcy, the payment of which by the mortgagees was necessary to preserve the property: see *In re Leslie.* (1) This applies to premiums paid before as well as after July 31, 1900. The subsequent mortgagees are in no better position than Pearce himself could have been. If the trustee in bankruptcy had been seeking to redeem, the result might have been different, having regard to s. 12 (*a*) of the Second Schedule to the Bankruptcy Act, 1883.

The result is that the minutes given out by the registrar must be varied as asked by the notice of motion. But the considerations which have led me to this conclusion apply equally to the interest on £*x* for the period between April 19, 1899, and July 31, 1900. Although this was not asked for by the notice of motion, I think the minutes must be altered so as to include this

(1) (1883) 23 Ch. D. 552.

C. A. 1909

PEARCE, *In re.*

interest. The appellants will have the costs of this application, which will be deducted from the costs of the appeal which they were ordered to pay.

BUCKLEY L.J. In argument the decision in *In re Savin* (1) was cited as having some bearing upon the question which we have to determine. In my opinion it has none. The point in that case was this: A secured creditor, some substantial time after the bankruptcy, realized his security. He was, of course, entitled to take out of it his mortgagee's costs, charges, and expenses, his interest to date, and his principal. But his security was deficient, and in that state of facts he sought to take out of his security, first, his mortgagee's costs, charges, and expenses, then his interest to date, then such part of his principal as the balance of the sum realized in respect of the security would satisfy, and then to prove in the bankruptcy for the remaining sum. This was held to be wrong, and for obvious reasons. The secured creditor was in that case in substance seeking to prove in the bankruptcy for interest subsequent to the bankruptcy. This he could not do. There are no such considerations here. The question here is not between the trustee and the secured creditor. The point arises thus. In March, 1901, the receiving order was rescinded, the bankruptcy annulled, and an order made revesting in Pearce his property; he subsequently created certain further mortgages. The question arises between the original mortgagee and those subsequent mortgagees. The original mortgagee says as regards the premiums, "I paid moneys to keep alive the security which was my security and yours, and as between you and me I am entitled to charge you with those premiums." I see no answer to that. The first mortgagee, as between himself and the subsequent mortgagees, is entitled to take not only so much of the debt as was not satisfied by the composition, but also the subsequent interest and the subsequent payments which he has made for the purpose of keeping alive the security. In my judgment, therefore, the parties here are entitled to bring into account the premiums which were paid in the interval between 1899 and 1900, and are

(1) L. R. 7 Ch. 760.

entitled to an order in the form which the Master of the Rolls has indicated.

C. A. 1909 PEARCE, *In re.*

KENNEDY L.J. I have had an opportunity of reading the judgment which has now been delivered by the Master of the Rolls. In that judgment I entirely concur and have nothing to add.

Solicitors: *H. J. Mannings; Robert Greening.*

W. C. D.

ATTORNEY-GENERAL *v.* GRAND JUNCTION CANAL COMPANY.

JOYCE J. 1909 *June* 30; *July* 1, 2, 5, 6, 12.

[1908 A. 1113.]

Canal Company—Diversion of Water from River—Statutory Powers—Urban District Council—Riparian Owners—Statutory Power to draw Water from River—Action by Attorney-General—Mandatory Injunction—Laches—Delay—Union and Grand Junction Canal Act, 1810 (50 *Geo.* 3, *c.* 122) *—Rugby Waterworks Act*, 1863 (26 *&* 27 *Vict. c. xxxiii.*)*—Rugby Water and Improvement Act*, 1901 (1 *Edw.* 7, *c. cclxix.*).

By an Act passed in 1810 a canal company, thereby incorporated, was empowered to make a canal and other works and to take the waters of a certain river and its tributary streams for the purpose of supplying the canal, but was prohibited from reducing the flow of the river below a certain average to be ascertained as therein provided. The canal works were completed in 1837 and had since been in operation without complaint until 1901. By another Act passed in 1894, and reciting that the canal and works had been duly constructed in accordance with the Act of 1810, the canal and undertaking were transferred to the defendants. The plaintiffs, an urban district council, had statutory powers to supply water in their district, and to draw from the river at a point below the canal works. They had also acquired property upon the banks of the river.

In an action by the Attorney-General at the relation of the plaintiff council, and by the plaintiff council, for an injunction to restrain the defendants from diverting from the river more water than they were entitled to under the Act of 1810, and for an injunction to restrain them from permitting the works to remain so constructed as not to comply with the Act:—

Held, that the defendants had only allowed the works, executed more than sixty years ago, to operate as they had done from the first, and

JOYCE J.
1909
ATTORNEY-GENERAL v. GRAND JUNCTION CANAL COMPANY.

had acquired by lapse of time an absolute right to the use of the water diverted by those works; the action of the plaintiffs as distinct from the claim of the Attorney-General therefore failed.

Held, further, with respect to the action by the Attorney-General, that the Court had a discretion as to granting a mandatory injunction in such a case, and, having regard to the length of time which had elapsed without objection or complaint, no such injunction ought to be granted.

TRIAL OF ACTION.

This was an action by the Attorney-General at the relation of the Rugby Urban District Council, and by the council as plaintiffs, for an injunction to restrain the defendants, the Grand Junction Canal Company, from taking more water for the purposes of their canal from the river Avon and its tributary streams than they were empowered to take by the special Act under which the canal was constructed and maintained; and for an injunction to restrain them from permitting their works to remain so constructed or in such a condition as to prevent a certain average quantity of water flowing in common seasons down the Avon and certain brooks and watercourses, or as not to comply with the provisions of the said Act.

By the Act 50 Geo. 3, c. 122 (hereinafter called the Act of 1810), intituled an Act for making and maintaining a navigable canal from the Union Canal in the parish of Gumley in the county of Leicester to join the Grand Junction Canal near Long Buckby in the county of Northampton, and for making a collateral cut from the same canal, it was enacted that the several persons therein named and their successors, executors, administrators, and assigns should be and were united into a company for the carrying on and making the said canal and cut, and for that purpose should be a body corporate by the name and style of the Company of Proprietors of the Grand Union Canal.

By s. 1 of the Act of 1810 the company thereby incorporated (hereinafter called the canal company) was authorized to make the canal, cut, certain reservoirs, and other works, and to supply the same for ever after with water from all such brooks, springs, streams, rivulets, rivers, waters, and watercourses which should flow or be found in digging or making the canal or cut respectively or within the distance of 1000 yards from any part of the said canal or any reservoir which should belong thereto.

Sect. 3 provided that "nothing herein contained shall be construed to extend to authorize or empower the said company of proprietors to take or suffer to be taken or used for the said canal or to flow or run into any reservoir or reservoirs or other works for the use thereof any of the springs or streams of water now flowing into or forming part of the river called the Avon which runs through the park of Henry Otway Esq. at Stanford Hall in the county of Leicester or from or by means of which the said river Avon is supplied with water (except in times of floods and wet seasons and when there shall be a surplus of water in the said river or the rivulets or watercourses flowing into the same such surplus to be ascertained in manner hereinafter mentioned) but that the said river and all such streams of water which shall or may be crossed or diverted by the said canal or any reservoir conductor aqueduct or other works appertaining thereto above the said park shall be well and effectually tunnelled and conducted under such canal and by the side of such reservoirs conductors or other works by the said company of proprietors immediately either into the former and ancient course of such river or streams of water or in such other manner as that the whole thereof (except in such times of floods and wet seasons and when there shall be such surplus of water) shall flow into the said river Avon before it reaches the said park."

By s. 4 it was enacted that nothing in that Act contained should authorize or empower the canal company so to diminish the water flowing into the Avon down the several brooks and watercourses in certain named parishes or places as at any time to reduce the quantity of water passing down the said brooks and watercourses below the average quantity thereof during the months of July to December.

By s. 5 provision was made for ascertaining and certifying in manner therein set forth the average quantity of water flowing as aforesaid. Under s. 8 the company was to provide permanent gauge weirs and other machinery for ascertaining the average flow.

The canal company shortly after the passing of the Act of 1810 duly constructed its canal and works, and the average flow of water within the meaning of the Act down the streams

JOYCE J. 1909

ATTORNEY-GENERAL v. GRAND JUNCTION CANAL COMPANY.

and watercourses referred to in the Act was duly ascertained and certified.

Under and by virtue of the Leicestershire and Northamptonshire Union and Grand Union Canals (Transfer) Act, 1894, and the assurance thereby authorized the undertaking of the canal company was transferred to and vested in the defendant company as part of their undertaking subject to all continuing contracts, engagements, covenants, servitudes, obligations, and liabilities entered into or incurred by or attaching to the canal company relating to the undertaking. That Act contained a recital that the canal company had duly constructed its undertakings in accordance with the Act of 1810.

Under and by virtue of the Rugby Waterworks Act, 1863, the plaintiff council as the successors of the then Rugby Local Board of Health were authorized to supply water within the urban district of Rugby and the parish of Bilton in the Rugby rural district.

By the Rugby Water and Improvement Act, 1901, the plaintiff council were authorized to execute and maintain certain works for the purposes of their water undertaking, and to collect, impound, and appropriate for those purposes, inter alia, the waters of the Avon at and above Brownsover mill dam, which was situate at a point on the river about four miles below Stanford Park. The plaintiff council were possessed of the Brownsover mill and other property on the banks of the river Avon below Stanford Park.

The plaintiffs alleged that the canal company in the construction of their works did not fulfil the provisions or requirements of the Act of 1810, but in breach of the same so constructed their works that they and the defendant company in succession had diverted and the defendant company were able and threatened and intended to divert and continue to divert into the canal from the river Avon and its tributary streams large quantities of water over and above the surplus quantity of water mentioned in the Act of 1810, and also large quantities of water at times when there had been or was no such surplus quantity of water in the said streams, and so that the water left to flow in the river Avon and the said streams above Stanford

Park had been and was still liable to be reduced below the average ascertained as directed in the Act of 1810.

The plaintiffs accordingly claimed—

(1.) An injunction to restrain the defendant company from taking or suffering to be taken or used for the canal or to flow or run into any reservoir or other work for the use thereof any of the springs or streams of water which at the passing of the Act of 1810 flowed into or formed part of the river Avon or from or by means of which the said river was supplied with water except only in times of floods and wet seasons and when there should be a surplus of water over and above the average quantity formerly flowing therein as ascertained under the Act of 1810.

(2.) An injunction to restrain the defendant company from so supplying the canal and other works with water as to diminish the quantity flowing into the Avon down the brooks and watercourses in the several parishes in the 4th section of the Act of 1810 mentioned, and as at any time to reduce the quantity passing down the said brooks and watercourses below the average ascertained as aforesaid.

(3.) An injunction to restrain the defendant company from permitting their works to remain so constructed or in such a condition as to prevent the ascertained average quantity of water flowing into the Avon or so as to divert from the said river or intercept any part of such average quantity of water.

(4.) An injunction to restrain the defendant company from permitting their works to remain as constructed and in such a condition as not to comply with the provisions of the Act of 1810.

The defendants alleged that the works which were taken over by them from the canal company were constructed between the years 1813 and 1837 and, except for repairs, were in the same condition in which they were so taken over.

The defendants denied that they or their predecessors had diverted from the river and streams more water than they were authorized to divert by the Act of 1810, and contended that if the canal and works had been constructed in breach of any obligation imposed on the canal company by the Act of 1810, which they did not admit, such breach must be deemed long since to have been waived or assented to.

JOYCE J. 1909 ATTORNEY-GENERAL v. GRAND JUNCTION CANAL COMPANY.

Hughes, K.C., and *J. G. Wood*, for the plaintiffs. The Attorney-General as representing the public can sue to restrain a corporation from doing acts which are illegal or ultra vires. His discretion to take proceedings on behalf of and at the instigation of any one affected is absolute: *London County Council* v. *Attorney-General* (1); *Attorney-General* v. *London and North Western Ry. Co.* (2); *Stockport District Water Co.* v. *Manchester Corporation.* (3)

When a corporation has exceeded its statutory powers the Attorney-General on behalf of the public has a right to apply to the Court for an injunction: *Ware* v. *Regents' Canal Co.* (4); *Devonport Corporation* v. *Tozer* (5); *Attorney-General* v. *Ashborne Recreation Ground Co.* (6); *Attorney-General* v. *Pontypridd Waterworks Co.* (7)

The Attorney-General is not affected by laches or delay when he is suing in respect of a continuing breach.

Apart from the action of the Attorney-General the plaintiff council are entitled to succeed in this action as lower riparian proprietors. Lapse of time is not an answer in a case of a continuing breach of a plain statutory obligation such as is under consideration in this case: *Rhymney Ry. Co.* v. *Glamorganshire Canal Navigation Co.* (8) The defendants can have acquired no prescriptive rights against the plaintiffs. At all times when what is complained of was done it was a breach of their statutory obligations.

A statutory company cannot acquire by prescription rights more extensive than are conferred upon it by the Legislature: *National Guaranteed Manure Co.* v. *Donald.* (9)

Where special statutory powers are granted what is not permitted is prohibited: *Attorney-General* v. *Great Eastern Ry. Co.* (10)

Sir C. A. Cripps, K.C., Younger, K.C., and *Austen-Cartmell*, for the defendants. The defendants deny the right of the plaintiffs to any share of the surplus water and say that under s. 1

(1) [1902] A. C. 165, 168.
(2) [1900] 1 Q. B. 78.
(3) (1863) 9 Jur. (N.S.) 266.
(4) (1858) 3 De G. & J. 212, 228.
(5) [1903] 1 Ch. 759.
(6) [1903] 1 Ch. 101.
(7) [1908] 1 Ch. 388.
(8) (1904) 91 L. T. 113.
(9) (1859) 4 H. & N. 8.
(10) (1880) 5 App. Cas. 473, 481.

qualified by s. 3 the defendants alone are entitled to all the surplus water after the stream has had the first pull for the average amount. Sect. 8 is merely an engineering section and was never meant to restore to the river the water given to the canal company by s. 1.

With regard to the question of weirs the defendants submit that the provisions of the Act have been complied with. The facts and figures shew that at all times the river has had more than the ordinary prescribed flow of water.

Moreover, the relators have no right to come to the Court now and complain of works which were constructed 100 years ago by the predecessors in title of the defendants. Although the latter may not have complied in every respect with the provisions of their Act, yet they selected the sites of the reservoirs in question with the assent of the riparian owners, and arranged with them to send them down a flow of water more beneficial to them than would have been the case if the terms of the Act had been strictly complied with. *Herron* v. *Rathmines and Rathgar Improvement Commissioners* (1) shews that a divergence may be so slight as not to be worth notice, as we submit was the case here, and also that if the promoters come to terms with the persons interested, then the latter are bound by those terms. The defendants are in the position of riparian owners who constructed these reservoirs 100 years ago and who would have acquired a right to the water under the Prescription Act: *Swindon Waterworks Co.* v. *Wilts and Berks Canal Navigation Co.* (2); Coulson and Forbes on The Law of Waters, 2nd ed. p. 124.

Statutory rights conferred by local Acts for the benefit of private individuals can be waived: *Hampstead Corporation* v. *Midland Ry. Co.* (3); *Goldsmid* v. *Great Eastern Ry. Co.* (4); *Countess of Rothes* v. *Kirkcaldy and Dysart Waterworks Commissioners* (5); *Savin* v. *Hoylake Ry. Co.* (6)

Since 1863 the relators have been taking all the water they required. They want the water in order to supply a town situated away from the river, and that is not what a riparian

(1) [1892] A. C. 498.
(2) (1875) L. R. 7 H. L. 697, 706.
(3) [1904] 2 K. B. 802.
(4) (1883) 25 Ch. D. 511.
(5) (1882) 7 App. Cas. 694.
(6) (1865) L. R. 1 Ex. 9.

JOYCE J. 1909 ATTORNEY-GENERAL v. GRAND JUNCTION CANAL COMPANY.

owner is entitled to do. On whatever ground they base their claim, whether as riparian owners or under their statute, we submit that they are claiming in respect of a right which has not been enjoyed for 100 years, and have no more right to take action in this case than a common informer.

Therefore we submit that delay for all these years is fatal to the relator plaintiffs, inasmuch as it leads to the presumption of laches and acquiescence, if not of express agreement, and that the divergence from the provisions of the statute is so slight as not to be worth notice.

With regard to the Attorney-General we submit that he cannot after the lapse of 100 years maintain this action.

The provisions of a local Act of this sort have to be treated as a bargain between the parties interested and as inserted for their own private purposes. They are not put in by the Legislature as part of a general scheme of legislation: per Lord Cairns L.C. in *East London Ry. Co.* v. *Whitechurch.* (1) They were put in for the benefit of the riparian owners who have acquiesced in the acts of the predecessors in title of the defendants. This is a private and proprietary river, and consequently the Attorney-General, having no interest, is not entitled to maintain this action. He cannot maintain an action in respect of a right enjoyed by only a limited section of the public: *Attorney-General* v. *Garner.* (2)

This is not a continuing offence on the part of the defendants, for the offence was committed once and for all when the works were constructed. It is the construction that constituted the breach of the statutory provision, and the taking of the water is merely an incident of the construction. On this ground also the Attorney-General is not entitled to maintain this action after the lapse of 100 years, and he is met by this further difficulty, that in the preamble to the Act of 1894, which vested the undertaking in the defendants, there is an express statement that the works had been duly constructed in accordance with the earlier Act. That statement is binding upon the Attorney-General in a question touching a proprietary and not a prerogative right, and he cannot now go behind it.

(1) (1874) L. R. 7 H. L. 81, 89. (2) [1907] 2 K. B. 480.

Further, there have been laches and acquiescence. Even in actions by the Attorney-General delay is a circumstance to be taken into consideration by the Court in determining whether it shall interfere to grant relief: per Turner L.J. in *Attorney-General* v. *Sheffield Gas Consumers' Co.* (1), per Sir W. Page Wood V.-C. in *Attorney-General* v. *Bradford Canal Proprietors* (2), and per Farwell J. in *Attorney-General* v. *Wimbledon House Estate Co.* (3) We submit that in the present case the Attorney-General is precluded by laches and acquiescence from bringing this action after 100 years. There is no authority which says that in a suit at the instance of the Attorney-General there is no such particularity required as in the case of a private contracting party.

Hughes, K.C., in reply.

Cur. adv. vult.

July 12. JOYCE J. This action is with respect to the taking or diversion of streams and water which originally, and in the natural state of things as existing at the beginning of the last century, were collected or found their way into the Avon, which rising in or near Naseby Field passes by Rugby to Stratford-on-Avon, and so on to the Severn at Tewkesbury.

In 1810 a local and personal Act was passed for enabling the Grand Union Canal Company, formed for the purpose, to construct and make a certain navigable canal and collateral cut in the Act particularly described. There were the usual general powers for effecting the purposes of the Act in reference to water and land, doing as little damage as may be and making compensation. The general idea appears to have been that the company should only take the excess of water in times of exceptional flood and so on, and that the water of the river Avon should not be brought below a certain average in certain months. The 3rd section of the Act provides that "Nothing herein contained shall be construed to extend to authorize or empower the said company of proprietors to take or suffer to be taken or used for the said canal . . . . any of the springs or streams of water now flowing

(1) (1853) 3 D. M. & G. 304, 324. (2) (1866) L. R. 2 Eq. 71.
(3) [1904] 2 Ch. 34, 42.

JOYCE J. 1909 ATTORNEY-GENERAL v. GRAND JUNCTION CANAL COMPANY.

into or forming part of the river called the Avon which runs through the park of Henry Otway, Esq., at Stanford Hall, in the county of Leicester, or from or by means of which the said river Avon is supplied with water (except in times of floods and wet seasons and when there shall be a surplus of water in the said river or the rivulets or watercourses flowing into the same, such surplus to be ascertained in manner hereinafter mentioned)"—that is a general condition of the Act. Then s. 4, also in general terms, provides that " Nothing in this Act contained shall extend to authorize or empower the said company of proprietors, their agents, servants, or workmen, in making or supplying the said canal, collateral cut, aqueducts or reservoirs, or any of them with water or for any other purpose whatsoever so to diminish the quantity of water flowing into the said river Avon down the several brooks and watercourses in the several parishes or places of North Kilworth," and so on, "as at any time to reduce the quantity of water passing down the said brooks and watercourses below the average quantity thereof during the months of July, August, September, October, November, and December." Then ss. 5, 6, and 7 provide for the ascertaining by the certificate of two certain named gentlemen what the average was or would be. Sect. 8, which has given rise to most of the discussion before me, is a positive section as to the works to be constructed for the purpose of ascertaining, which there, I think, means measuring off, the average quantity of such water flowing into the river, and so on, and it provides for the construction of certain ponds, basins, and other works. Now in pursuance of these powers or affecting to act under them the Grand Union Canal Company constructed reservoirs and executed various extensions and costly works which had the effect of conducting or diverting into the canal or feeders considerable streams or portions of streams of water which the Avon would otherwise have taken up. These works were openly constructed and executed, and from the first were manifest to the world. They were completed at dates which were given to me and accepted, the Sulby Reservoir, as I understand, in May, 1813, and the Naseby Reservoir in 1821; the syphon, which was much discussed, was made in 1813, and there were some other works, I

believe, in 1834. The reservoirs were enlarged in 1837. I think I may say, therefore, that these works, constructed as I have mentioned, were completed about sixty years ago, or were certainly in full operation for more than forty years before 1894, as they ever since have been.

Another Act of 1894 provides for the transfer of the canal and undertaking of the Grand Union Canal Company to the present defendants. That Act contained a recital that the Grand Union Company had duly constructed their undertakings in accordance with the Acts, including the Act of 1810. It seems to me that if this were the fact there would be no real foundation for the present action, for the transfer was to be subject to "performing and fulfilling all continuing contracts, engagements, covenants, servitudes, obligations, and liability of every kind of or entered into or incurred by or attaching to" the original company, the Grand Union Canal Company. Unless the alleged liability now sought to be enforced was a continuing liability of the original company, I have considerable difficulty in seeing how the present defendants are subject to it; at all events the liability, such as it is, of the defendants only attaches under an Act containing the recital which I have mentioned.

The Rugby Urban District Council appear to be riparian proprietors owning, among other things, what is, or was, a mill on the banks of the Avon. They allege that the original reservoirs and works of the Grand Union Canal Company still existing were made, not in accordance with, but in various respects were arranged and are constructed in contravention of, certain provisions of the Act of 1810, and in particular s. 8, so that by the operation of these works more of the water than would otherwise have passed down the Avon has, for the last ninety years or so, gone to the canal. No complaint of anything of this kind was made before the year 1901. Even now there is no suggestion of any actual damage to the riparian property or rights of the plaintiff council, but they have certain powers of taking water for their district, and their avowed motive for bringing this action is the supply of water to the town and district of Rugby. The defendants say that in fact the works as constructed and in operation were executed in substantial compliance with the provisions of the Act, and they

JOYCE J. 1909 ATTORNEY-GENERAL v. GRAND JUNCTION CANAL COMPANY.

have all along given the Avon more than it was entitled to or intended to have, and they further say that the urban district council will get less water than now if they succeed in this action. I think there is some ground for this last contention, but it would be difficult to decide, and I do not decide, which party is right in that particular controversy. I think, however, that, according to the authorities, the rights of the urban district council as riparian proprietors under such an Act as that of 1810 in respect of water might be waived, granted, or released—in other words, might be dealt with by contract. As against the urban district council, or their predecessors, I do not see why the Union Canal Company and the defendants, their successors, have not acquired by lapse of time an absolute and indefeasible right to the use and benefit of the water diverted or taken into the canal and its feeders by the works that were executed by the Union Canal Company more than sixty years ago.

Various complaints as to comparatively small matters were remedied before the action. The defendants have never contested their liability to cleanse, repair, and maintain the works as they exist. [His Lordship then dealt with these minor matters, and continued.]

Now, what relief is asked? Paragraph 4 of the claim is plainly for a mandatory injunction in a form to which distinctly the decision of the Court of Appeal in *Jackson* v. *Normanby Brick Co.* (1) applies, where Lord Lindley, then Master of the Rolls, said that with regard to orders sought to be obtained in the form of a short paragraph put in the statement of claim it would be better for the Court in future to say in terms what it means, and in direct words to order the buildings, as they were in that case, to be pulled down and removed. Generally the contention of the plaintiffs in this action is that the works, or certain of them, were not duly constructed in accordance with the Act of 1810, and that the present defendants are bound to remove these and generally to reconstruct them, notwithstanding, as I have said before, that their only liability is under an Act which states that the works were then duly constructed. Similarly par. 3 is for a mandatory injunction just as much as par. 4, and the remarks I have

(1) [1899] 1 Ch. 438.

already made with regard to par. 4 apply to par. 3. I think it would be wrong in any view of the case to grant an injunction in such indefinite terms as asked, even if an injunction might be granted in terms referring to and depending on the certificate made by Bevan and James under s. 5 and subsequent sections of the Act. The like observations appear to me to apply to the latter part of clause 1 of the claim. It rather seems to me that it is a figure of speech to say that these defendants take or supply water in that way. All they do is to leave the original works, constructed nearly a century ago, to operate as they were doing at the date of the transfer in 1894 and have been doing from the first. Upon the whole, rightly or wrongly, I come to the conclusion that these defendants are not bound at the instance of the urban district council, suing merely as a riparian proprietor, to remove the original works or any of them and reconstruct them, or to construct entirely new works. In other words, I think that the action technically so called of the urban district council as distinct from the claim of the Attorney-General fails.

But there remains the action which formerly, and perhaps more conveniently, would have been called an information by the Attorney-General. He sues here not on behalf of His Majesty claiming by prerogative or otherwise, in other words not ex officio, but at the relation of the urban district council as representing the public if and so far as the public have any interest or any of the clauses of the Act of 1810 now in question were for their protection. If the Attorney-General had come to the Court between the years 1810 and 1820, or perhaps before 1830, and filed an information against the old Union Canal Company claiming a literal performance of the provisions of the Act of 1810, he might possibly have succeeded. But we are now in the year 1909. The position of the authorities with respect to laches on the part of the Attorney-General is stated at pp. 578 et seq. of Mr. Robertson's very able and learned treatise on Civil Proceedings by and against the Crown. I am of opinion, and I decide, that in such a case as the present, whether the Attorney-General be barred by laches or not, at all events with respect to relief by injunction, especially by mandatory injunction, the Court has at

JOYCE J. 1909 ATTORNEY-GENERAL v. GRAND JUNCTION CANAL COMPANY.

least a discretion, and ought to have regard to the very long period of time which has elapsed without objection being taken or complaint made to the costly works that were originally constructed and have since been maintained at considerable expense. I doubt whether any public interest has been prejudicially affected by what has been done, and I rely upon what Turner L.J. (than whom no more careful and accurate judge ever presided in the Court of Chancery) says in *Attorney-General* v. *Sheffield Gas Consumers' Co.* (1) In that case he said (2): "That delay will affect the Attorney-General as much as a private individual I am not prepared to say; but, in my opinion, it is a circumstance to be considered in determining the question whether this Court shall interfere, although the application to the Court be on behalf of the Attorney-General, and I ground myself in that opinion upon what fell from Lord Eldon in the case of *Attorney-General* v. *Johnson.* (3) In that case Lord Eldon distinctly states his opinion to be that delay is to be considered in determining a question of injunction, though the application may be by the Attorney-General on behalf of the public. I think, therefore, that this case fails, so far as the public are concerned." If the urban district council have no title to relief in the present case, looking at the remote period at which the works now complained of were executed, and the terms of the statutory transfer, and all the circumstances, I think upon the whole that I ought not, even at the instance of the Attorney-General suing at the relation of the urban district council, to grant any such injunction as asked. The result therefore is that the action fails altogether and must be dismissed.

Solicitors for plaintiffs: *Routh, Stacey & Castle.*
Solicitors for defendants: *Patersons, Snow, Kinder & Lawson.*

(1) 3 D. M. & G. 304. (2) 3 D. M. & G. 324.
(3) (1819) 2 Wils. 87.

G. A. S.

BROOKS *v.* MUCKLESTON.

JOYCE J.
1909
July 26.

[1908 B. 3852.]

Mortgage—Foreclosure—Advowson in Gross—Equitable Mortgage—No Payment of Principal or Interest for forty-eight Years—Stale Demand—"Land"—Real Property Limitation Act, 1833 (3 & 4 *Will.* 4, *c.* 27), *s.* 1.

The plaintiffs sought foreclosure of an equitable mortgage of an advowson in gross. The mortgage was created by deed in 1860, accompanied by deposit of the title deeds. No claim for, or payment of, principal or interest had ever been made, and no acknowledgment ever given. The plaintiffs were assigns of the original mortgagees, but the express power of sale did not extend to assigns. The defendant had been the incumbent of the living since 1865, and in 1892 had bought the advowson, with notice of the mortgage, from the official receiver in bankruptcy of the original mortgagor.

An advowson is not "land" within the meaning of that term as used in the Real Property Limitation Act, 1833.

Held, that the equitable doctrine of staleness of demand applied, and that the plaintiffs' claim failed.

Adjourned Summons.

By an indenture of mortgage dated October 16, 1860, the mortgagor covenanted and agreed with the mortgagees that in consideration of 1000*l.* advanced by them on a joint account the advowson thereinafter described should thenceforth remain, continue, and be a security to the mortgagees, their heirs and assigns, in manner thereinafter mentioned, and it was thereby witnessed that the mortgagor had deposited with the mortgagees the title deeds to the advowson, and he further covenanted that he would, when required, grant and release the advowson, donation, presentation, free disposition and right of patronage and next and every other presentation of and to the rectory and parish church of Haseley in the county of Warwick and all his estate and interest therein unto and to the use of the mortgagees, their heirs and assigns, subject to the proviso for redemption therein contained (which was in the common form), and in case of default a power of sale was given to the mortgagees, their heirs, executors, or administrators, and it was provided that the receipts in writing of the mortgagees, their executors, administrators, or assigns, should be a sufficient discharge for

JOYCE J. 1909 BROOKS v. MUCKLESTON.

the purchase-moneys. Then followed the usual covenants by the mortgagor for payment of principal and interest and for title.

In 1863 the mortgagor was adjudicated bankrupt. The defendant had been the incumbent of the living since 1865, and in 1892 he purchased the advowson from the official receiver, who had made a report that nothing had been paid on account of principal or interest in the bankruptcy nor any acknowledgment of the mortgagees' title given. The receiver conveyed the advowson and all other the estate then vested in him to the defendant in fee simple, subject to such rights or interests, if any, as might be still subsisting under or by virtue of the mortgage of October 16, 1860.

After many mesne devolutions the mortgage ultimately became vested in the plaintiffs, who took out this summons for a declaration that they were entitled to an equitable mortgage on the advowson, an account, and sale or foreclosure.

It appeared from the evidence that nothing had been paid in respect of either principal or interest under the mortgage, and that no acknowledgment had ever been given or claim for payment made; that the defendant had in 1892 mortgaged the advowson as free from incumbrances to certain persons who had lent money thereon, but that such mortgage had been discharged; and also that the plaintiffs had recently contracted to sell the advowson to a purchaser.

The arrears of interest amounted to 2450*l.*

Peck, for the plaintiffs. The power of sale in the mortgage deed is not given to the assigns of the mortgagees, and therefore the plaintiffs cannot sell: *Bradford* v. *Belfield* (1); if it had not been inserted in the deed they could have sold under Lord Cranworth's Act. Until the plaintiffs came to sell they thought they had a good power of sale, and it was mainly on that account that they did not come earlier for foreclosure. Moreover, the unsaleable nature of the property militated against an application for foreclosure.

The plaintiffs claim to be entitled to arrears of interest for the

(1) (1828) 2 Sim. 264.

entire period. In *In re Stucley* (1) twenty-six years' arrears of interest were allowed. The plaintiffs are not suing for interest, or asking the defendant to bring in accounts; they will do that themselves. What they now claim is the ordinary mortgagee's right to foreclosure. The Real Property Limitation Act, 1833, does not apply to this case, an advowson not being "land" within the meaning of that word in s. 1.

[JOYCE J. I have to try this case as if it had come before the Court in the beginning of last century.]

At that time, and at the present day, mere lapse of time is in itself no bar to a claim in equity: *Pickering* v. *Lord Stamford* (2); *Clegg* v. *Edmondson* (3); *Chalmer* v. *Bradley*. (4) *Hatch* v. *Hatch* (5) was the case of an advowson, and Lord Eldon there said, with reference to the particular nature of an advowson, that length of time did not afford so considerable an objection as in the case, for instance, of stock, or an annuity, or estate.

There is no general rule of this Court for presuming a mortgage to be satisfied after twenty years or any other period of time elapsing without payment or demand of principal or interest: *Toplis* v. *Baker* (6); *Trash* v. *White*. (7) In *Christophers* v. *Sparke* (8) the mortgage was presumed satisfied, but in that case there had been possession for twenty years without payment of interest or acknowledgment. That is not applicable to the present case, because there can be no possession of an advowson.

There is no case where the doctrine of stale demand has been applied to a mortgagee seeking foreclosure.

I rely upon *London and Midland Bank* v. *Mitchell*. (9) The plaintiffs have not abandoned their security, and the best argument against any such suggestion is the fact that they have contracted to sell the property. [He also referred to *In re Brown's Estate*. (10)]

Norton, K.C., and *H. Dobb*, for the defendant, after referring to *Williams* v. *Thomas* (11), were stopped by the Court.

(1) [1906] 1 Ch. 67.
(2) (1793-5) 2 Ves. 272, 581.
(3) (1857) 8 D. M. & G. 787, 807, 808.
(4) (1819) 1 Jac. & W. 51, 66, 67.
(5) (1804) 9 Ves. 292.
(6) (1789) 2 Cox, 118.
(7) (1791) 3 Bro. C. C. 289.
(8) (1820) 2 Jac. & W. 223.
(9) [1899] 2 Ch. 161.
(10) [1893] 2 Ch. 300.
(11) [1909] 1 Ch. 713.

JOYCE J. 1909 BROOKS v. MUCKLESTON.

JOYCE J. This is an action commenced by originating summons to foreclose a mortgage which is not a legal mortgage, but is an equitable mortgage created by a deed dated October 16, 1860, and it seems to me that every legal right of every sort or kind that could possibly exist under that deed is barred by some statute.

It is as near as may be forty-eight years since the advance is alleged to have been made, and the plaintiffs now claim 1000*l.* for principal and 2450*l.* for interest. Nothing has ever been paid in respect of principal or interest, and there has been no acknowledgment of any kind on the part of the owner of the equity of redemption, and no claim for payment made on the part of the mortgagees. As I have already said, no action of covenant or contract can be brought under the original deed.

The property in question is an advowson in gross. It is real property, and it is a freehold, although it is not "land" within the meaning of that expression as defined by s. 1 of the Real Property Limitation Act, 1833. So that this mortgage is not within that or any subsequent statute for the limitation of suits relating to real property. I do not think that s. 27 of the Act is material, and s. 29, which relates to the recovery of church property and advowsons, has no application. It seems to me, therefore, that this falls to be decided as if it came before the Court at the beginning of last century, before the date of the Real Property Limitation Act. [His Lordship stated the facts, and continued:—] It does not appear whether any claim was made in the bankruptcy, but no claim has ever been made on the defendant before the issue of this present summons. In my opinion this is a stale claim. The security appears to me to be worthless, and the advowson has in fact been dealt with as if it were free from incumbrances.

In *Smith* v. *Clay* (1) Lord Camden L.C. held that a bill of review might be barred by delay of twenty years, and in the course of his judgment he made the following observations:— "A Court of Equity which is never active in relief against conscience, or public convenience, has always refused its aid to stale demands, where the party has slept upon his right and

(1) (1767) 3 Bro. C. C. 640, n.

acquiesced for a great length of time. Nothing can call forth this Court into activity, but conscience, good faith, and reasonable diligence; where these are wanting, the Court is passive, and does nothing. Laches and neglect are always discountenanced, and therefore from the beginning of this jurisdiction, there was always a limitation to suits in this Court." That statement has met with the entire approval of Lindley L.J. In *In re Sharpe* (1), when sitting in the Court of Appeal, he said: "That staleness of demand as distinguished from the Statute of Limitations and analogy to it may furnish a defence in equity to an equitable claim was settled at least as early as *Smith* v. *Clay*." (2) And in *Rochefoucauld* v. *Boustead* (3) his observations upon laches and lapse of time apart from the Statute of Limitations, when delivering the judgment of the Court of Appeal, are to the same effect.

I dismiss this summons on the ground of laches on the part of the persons entitled under the mortgage deed, for a more stale demand it would be difficult to imagine.

Solicitors: *Taylor, Hoare & Pilcher, for Heath & Blenkinsop, Warwick; Lowndes & Son, for A. V. Clements, Cambridge.*

(1) [1892] 1 Ch. 154, 168. (2) 3 Bro. C. C. 640, n.
(3) [1897] 1 Ch. 196, 209—212.

R. M.

SWINFEN EADY J.

1909

Jan. 23.

ATTORNEY-GENERAL *v.* GEORGE C. SMITH, LIMITED.

[1908 A. 1344.]

Dentist—Company—Registration under Companies Acts—Use of Word "Dentist" —Dentists Act, 1878 (41 & 42 *Vict. c.* 33), *s.* 3—*Deceiving Public—Injunction.*

Though a limited company is not "a person" within the Dentists Act, 1878, the Court will restrain such a company from representing that they carry on the business of dentists in succession to a man who has been struck off the Dentists' Register for misconduct, or taking any name implying that they are registered under the Dentists Act, or are persons specially qualified to practise dentistry.

The defendant company was incorporated on October 22, 1906, having been formed to acquire and take over as a going concern the business of dentists and makers of artificial teeth lately carried on by G. C. Smith at various places in Kent. G. C. Smith had been in practice as a dentist before the commencement of the Dentists Act, 1878, and had been placed on the register on that qualification. On May 22, 1906, he was struck off the Dentists' Register by the General Medical Council for professional misconduct. After this he was twice convicted and fined under the Dentists Act, 1878 (41 & 42 Vict. c. 33), which provides that from and after August 1, 1879, "a person shall not be entitled to take or use the name or title of 'dentist' (either alone or in combination with any other word or words), or of 'dental practitioner,' or any name, title, addition, or description implying that he is registered under this Act or that he is a person specially qualified to practise dentistry, unless he is registered under this Act," and imposes penalties on any person taking or using such a name.

This action was brought by the Attorney-General on the relation of the secretary of the Dental Association against the company and G. C. Smith. The statement of claim alleged that the company unlawfully and wrongfully carried on the practice or business of dentists in various places and unlawfully employed therein G. C. Smith and other persons not being

registered dentists or legally qualified medical practitioners to carry on the business of dentists, and that by circulars and otherwise the company took and used the style or title of surgeon dentists, and induced the public to believe that registered and qualified dentists were carrying on the practice of dentistry on behalf of the company.

The claim was for an injunction to restrain the company and G. C. Smith from (1.) carrying on the profession or business of a dentist; (2.) representing that they were carrying on the business of a dentist as successors to G. C. Smith, or that they were dentists, &c., following the words of the Act; (3.) carrying on the profession or business of a dentist with the aid of persons not qualified or registered under the Dentists Act.

No defence was delivered, and the action came on as a short cause on motion for judgment in default of defence.

Micklem, K.C., and *R. W. Turner*, for the plaintiffs. In *Pharmaceutical Society* v. *London and Provincial Supply Association* (1) the House of Lords decided that in the Pharmacy Act the word "person" did not include such a company, and a company were not liable to the penalties imposed by that Act. That Act is in pari materia with the Dentists Act, and it has been held in the Irish case of *O'Duffy* v. *Jaffe, Ld.* (2) that the decision applies to cases under the Dentists Act. But in *Attorney-General* v. *Myddletons, Ld.* (3) the Irish Court held that though a company was not a person, they were not at liberty to use the word "dentist" or its synonyms in such a way as to amount to a false representation. In another Irish case, *Rex* v. *Registrar of Joint Stock Companies for Ireland* (4), the Court refused to order the registrar to register "S. G. Rowell, Dentist, Limited," as the name of a company, S. G. Rowell being one of the signatories of the memorandum of association who had practised as a dentist but was not qualified.

[SWINFEN EADY J. You may have an injunction against the company because it is exceeding its powers, but I do not see how you can have an order against Smith.]

(1) (1880) 5 App. Cas. 857.
(2) [1904] 2 I. R. 27.
(3) [1907] 1 I. R. 471.
(4) [1904] 2 I. R. 634.

SWINFEN EADY J. 1909 ATTORNEY-GENERAL v. GEORGE C. SMITH, LIMITED.

We shall be quite content with an order against the company, limited to paragraph (2.) of the claim.

SWINFEN EADY J. then granted an injunction in the following form :—

"This Court doth order that the defendants George C. Smith, Limited, be perpetually restrained from representing that they are carrying on or intend to carry on the profession or business of a dentist or surgeon dentist as successors to George Charles Smith, surgeon dentist, or that they are dentists or dental practitioners, and from taking or using any name, title, addition, or description implying that they are registered under the Dentists Act, 1878, or are persons specially qualified to practise dentistry."

Solicitors : *Bowman & Curtis Hayward.*

J. R. B.

NEVILLE J. 1909 *June* 29, 30.

In re UNITED SERVICE SHARE PURCHASE SOCIETY, LIMITED.

Industrial and Provident Society—Winding-up—Contributories—Withdrawal of Subscriptions—Liability in respect of Withdrawals—Death of Member before Winding-up—Liability of his Estate—Industrial and Provident Societies Act, 1893 (56 & 57 *Vict. c.* 39), *ss.* 10, 34, 58, 60; *Sched. II., clauses* 7, 9.

The rules of a society registered under the Provident and Industrial Societies Acts provided that its capital should be raised by shares of 5*l.* each; that the subscription should be not less than 2*s.* 6*d.* on each share per month, but that a member should not be bound to pay any subscription after the first, unless required by the directors; and that a member might withdraw all or any part of his subscriptions. They also provided that a member whose interest in the society was less than 100*l.* might nominate persons to whom his shares were to be paid on his death, but in default of such nomination, or if a member whose interest exceeded 100*l.* should die, his interest was to be payable or transferable only to his executors. Certain members had paid up the subscriptions on their shares in full, and then withdrawn part, and in some cases afterwards paid up part of the subscriptions so withdrawn. All these transactions were entered in the pass-books of members and the books of the company as payments and withdrawals on account of their shares. Some members had subscribed for one share only in order to obtain an advance and paid the first subscription of 2*s.* 6*d.* and had repaid the whole of the advance, but had not formally withdrawn

their shares or obtained repayment of the 2*s.* 6*d.* Other members had died, having at the date of their death some subscriptions to their credit in respect of shares, and their executors had not withdrawn the whole. The society was being wound up compulsorily.

The Industrial and Provident Societies Act, 1893, requires that the rules should make provisions as to withdrawal of shares and provides that a member shall cease to be a member on withdrawal:—

Held, (1.) that so long as a member left any subscriptions standing to his credit in respect of shares he was liable to pay, on calls made by the directors or in a winding-up, the difference between the amount so standing to his credit and the nominal amount of the shares, including subscriptions which he had paid up and then withdrawn; (2.) that the liability of a member was not terminated by his death: in this respect societies under this Act are to be distinguished from building societies; (3.) that the advanced members were liable for the difference between the 5*l.* nominal amount of their share and the 2*s.* 6*d.* paid, notwithstanding that they had repaid their advances.

THE United Service Share Purchase Society, Limited, was incorporated in 1882 under the Industrial and Provident Societies Act, 1876, with the name of the Post Office Clerks Share Purchase Society, Limited. Its object, as stated in the rules, was to carry on the trade of buying and selling the shares of the Civil Service Supply Association; but its actual purpose was to enable members by means of advances to purchase those shares. In 1889 the rules were amended, and from that time the society made advances to members upon the security of any class of property, either by way of ordinary mortgages bearing interest at 6 per cent., or by mortgages for a fixed term of years at a premium, the advance and premium being repayable by instalments. There was no limit to the capital of the company, but it was divided into shares of 5*l.* each. No member was allowed to hold more than forty shares. The shares were to be paid up by monthly subscriptions of 2*s.* 6*d.*, but no member was to be bound to pay any subscription after the first unless required by the directors. In fact, no member had ever been required to pay more than the first subscription. Members had power to withdraw the whole or part of their subscriptions. Many members had paid up their shares in full or in part, and had afterwards withdrawn part or the whole of their subscriptions. The shares were not transferable.

The affairs of the society were controlled by a committee of

NEVILLE J. 1909 UNITED SERVICE SHARE PURCHASE SOCIETY, LIMITED, *In re.*

management consisting of five directors. In practice upon an application to become a member the applicant paid a sum of at least 2*s.* 6*d.* per share, 3*d.* per share by way of entrance fee, and 6*d.* for a pass-book. No certificates of shares were ever issued, but in the pass-book issued to each member he was entered as the holder of the shares allotted to him. Payments made by the member at the time of his application for shares, or at any time afterwards, were entered in the pass-book under the heading "subscriptions," and any withdrawals by the member were entered under the heading "repayments." Similar entries were posted in the society's ledger. In the case of a member obtaining advances from the society, entries of the particulars thereof and of any securities given for them were made in the pass-book, and similar entries of any repayments of the advance or part thereof were made.

The society had power to issue, and had issued, preference shares, but they had no priority in repayment of capital; and for the purposes of the summonses in this case there was no difference between preference and ordinary shares. On May 19, 1906, an order was made for the compulsory winding-up of the society. The debts of the society had been provided for from sources other than calls upon the members. The official receiver, who was the liquidator, had settled a list of contributories in order to adjust the rights of the shareholders inter se. These summonses were taken out by six persons whom he had settled on the list, for rectification. Each case was to be taken as a test case for other persons in a similar position. The facts of each of the six cases were as follows:

(1.) Mrs. Fowler subscribed to the society in March, 1893. She then paid 15*l.* besides the entrance and pass-book fees. She afterwards made payments amounting, with the 15*l.*, to 68*l.* 3*s.* 7*d.*, but then withdrew 40*l.* 4*s.* 7*d.*, leaving to the credit of her account 27*l.* 19*s.*

(2.) A. K. Bennett subscribed to the society in January, 1897, for the full number of forty shares and paid up 200*l.* in full. On February 5, 1900, he withdrew 100*l.*, and on December 5, 1900, he withdrew 95*l.*, and in March, 1903, he paid in 47*l.*, which was entered in his pass-book and in the share ledger

of the society as a subscription in respect of the same shares, making 52*l.*, which stood to his credit at the date of the winding-up.

(3.) A. H. Mann's case was in all respects similar to Bennett's, except that, after paying for forty shares in full and withdrawing all but 2*l.* 10*s.*, he had not made any further payments to the society.

(4.) W. A. Meek's case was the same as that of Bennett, except that he had died more than a year before the winding-up and the claim was made against his executors. The sum to his credit was 107*l.*

(5.) T. P. Sutton subscribed for one share on June 9, 1896, and paid up 2*s.* 6*d.* only. On the same date he received an advance of 75*l.*, which he had entirely paid off by instalments. His advance account in the society's books was closed on February 1, 1905, but he had not withdrawn the 2*s.* 6*d.*, and his name remained on the register.

(6.) Pye's case was similar to Sutton's, but at the date of the winding-up 34*l.* 13*s.* 4*d.* remained owing to the society out of advances amounting to 275*l.* This had since been repaid to the liquidator.

In each of these cases the official receiver had settled the applicant upon the list of contributories for the amount of the difference between the sum standing to his credit and the full amount of the shares originally subscribed for.

The rules upon which the argument turned were as follows:

"1. . . . . The object of the society shall be to carry on the trade of buying and selling the shares or stock of any society registered under the Industrial and Provident Societies Act, 1876, or under the Building Societies Acts, or of any company with limited liability, registered under the Companies Acts, or incorporated by Act of Parliament or by charter; the society may advance money to members upon the security of shares or stock in any such society or company, or upon the security of any real or personal property."

"2. The capital of the society shall be raised by shares of 5*l.* each. No member shall hold more than forty shares, and the subscription shall be not less than two shillings and sixpence on

NEVILLE J. 1909 — UNITED SERVICE SHARE PURCHASE SOCIETY, LIMITED, *In re.*

each share per month, provided that a member shall not be bound to pay any subscription after the first, unless required by the directors. Any sum being a multiple of two shillings and sixpence, may be paid on a share at any time until the share has been fully paid up . . . . The directors shall have power to issue preference shares bearing interest at a rate not exceeding 5 per cent. per annum."

"4. Every member shall pay an entrance fee of threepence a share, and shall have given him a copy of the rules of the society, and pass-book, for which he shall pay sixpence. . . . ."

"5. A member may withdraw the whole or part of his subscription at any time, subject to one month's notice being given, and to the funds at the disposal of the society being sufficient. The directors shall have power to pay any sum on demand if they think fit. No share or shares shall be transferable."

11. After provisions enabling a member to nominate persons to whom his shares were to be transferred at his death if his interest in the society did not exceed 100*l.*, "If any member entitled to an interest in the society not exceeding 100*l.* dies leaving a will, and without having made any nomination which remains unrevoked at his death, or if any member entitled to an interest in the society exceeding 100*l.* dies, such interest shall be transferable or payable only to his executors or administrators."

"14. Advances may be made to members upon the security of any property mentioned in rule 1, subject to the approval of the directors.

"The advances shall be made either (1.) by way of mortgage bearing interest at the rate of 6 per cent. per annum, or at such other rate as the directors may think fit, payable quarterly in advance; or (2.) by way of mortgage for a fixed term of years at a premium, and repayable by monthly instalments comprising principal and premium."

"18. At the expiration of each year the directors shall ascertain the amount of profits realized after providing for the payment of the interest of the preference shares to the holders thereof, and making any provision which may be deemed necessary for contingencies, and shall divide the profits between all the

remaining members in proportion to the amount of the subscriptions."

Younger, K.C., and *Clauson*, for the summonses. Industrial and provident societies are put by the Legislature in an anomalous position, analogous partly to building societies and partly to limited companies. The law relating to them is consolidated in the Industrial and Provident Societies Act, 1893. (1) Sect. 58 makes provision for winding up such a society,

(1) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39):—

Sect. 10. "(1.) The rules of a society registered under this Act shall contain provisions in respect of the several matters mentioned in the Second Schedule to this Act."

Sect. 34. "Any register or list of members or shares kept by any society shall be prima facie evidence of any of the following particulars entered therein:—

"(*a*) The names, addresses, and occupations of the members, the number of shares held by them respectively, the numbers of such shares, if they are distinguished by numbers, and the amount paid or agreed to be considered as paid on any such shares;

"(*b*) The date at which the name of any person, company, or society was entered in such register or list as a member;

"(*c*) The date at which any such person, company, or society ceased to be a member."

Sect. 58. "A registered society may be dissolved—

"(*a*) By an order to wind up the society, or a resolution for the winding up thereof, made as is directed in regard to companies by the Companies Acts, 1862 to 1890, the provisions whereof shall apply to any such order or resolution . . . ."

Sect. 60. "Where a registered society is wound up in pursuance of an order or resolution the liability of a present or past member of the society to contribute for payment of the debts and liabilities of the society, the expenses of winding up, and the adjustment of the rights of contributories amongst themselves, shall be qualified as follows:—

"(*a*) No individual, society, or company, who or which has ceased to be a member for one year or upwards prior to the commencement of the winding up, shall be liable to contribute; . . . .

"(*d*) No contribution shall be required from any individual, society, or company exceeding the amount, if any, unpaid on the shares in respect of which he or it is liable as a past or present member;

"(*e*) An individual, society, or company shall be taken to have ceased to be a member, in respect of any withdrawable share withdrawn, from the date of the notice or application for withdrawal."

Sched. II.: "7. Determination whether the shares or any of them

NEVILLE J. 1909 UNITED SERVICE SHARE PURCHASE SOCIETY, LIMITED, *In re.*

and s. 60 governs the liability of members. As in the case of building societies, shares in these societies may be withdrawn. Sometimes, as in rule 5 here, the provision is that subscriptions may be withdrawn, sometimes that shares may, but the meaning is the same whatever form of words is used: Wurtzburg on Building Societies, 4th ed. p. 180.

The question in all the cases is, What is the meaning of "unpaid" in s. 60 of the Act? We submit that it means the difference between the nominal amount of the shares and the sums the member has paid. Subsequent withdrawals cannot make any difference. They cannot create any liability to pay over again. In the Companies Acts, where there is power to return capital to shareholders and their liability is thereby increased, it is expressly so provided (Companies Acts, 1880, s. 3, and 1908, s. 40). There is no such provision here. *In re Gwawr-y-Gweithyr Industrial and Provident Society* (1) could not have been decided as it was if subscriptions withdrawn could be called up again. It is against the whole principle of this and similar Acts that a man should be made to pay twice over. In Mrs. Fowler's case the full amount was never paid, but the amount for which she is liable is the difference between what she actually paid and the nominal value of her shares. In Bennett's case he paid for all his shares in full, and no liability to pay again could arise. There is in his case the further point that he drew out 195*l.*, and must therefore be taken to have withdrawn thirty-nine of his forty shares, retaining one fully-paid share. His subsequent payment of 47*l.* was either an advance to the society, for which he is a creditor, or a subscription for fifty new shares, leaving him liable for 3*l.* The same arguments apply to Mann's case.

---

shall be transferable; and provision for the form of transfer and registration of the shares, and for the consent of the committee thereto; determination whether the shares or any of them shall be withdrawable, and provision for the mode of withdrawal and for payment of the balance due thereon on withdrawing from the society."

"9. Determination whether and how members may withdraw from the society, and provision for the claims of the representatives of deceased members, or the trustees of the property of bankrupt members, and for the payment of nominees."

(1) [1901] 2 K. B. 477.

In Meek's case his death terminated his membership. The point has been decided again and again as to building societies: e.g. *In re West London and General Permanent Benefit Building Society.* (1) There is nothing in ss. 25 and 26 of the Act or in the rules inconsistent with this, and it would follow naturally from the fact that the shares are not transferable. Under s. 11 shares are transferable or payable to his executors, but the executors need not accept a transfer, and if they do not they are paid out. This can only be because the membership ceased at death.

In Sutton's case he was not an investing member. He joined the society only to obtain a loan, and as he paid it off before the winding-up his contract with the society ceased. He cannot be made liable because he did not withdraw the 2*s.* 6*d.*, which he probably regarded as a fee for the loan and irrecoverable.

Pye's case is more difficult, and is not pressed.

Romer, K.C., and *Dunham*, for the official receiver. In the Act of 1893 the only reference to withdrawal is to withdrawal of shares in s. 60 (*e*), and Sched. II., clause 7. There can be no withdrawal of anything but a share. The provision in the society's rules for withdrawal of "subscriptions" either means the same thing, or it is ultra vires.

[NEVILLE J. I must take the rules as they stand, and they authorize withdrawal of subscriptions in whole or in part.]

Then the argument that withdrawn subscriptions remain paid up is ill-founded. Rule 2 makes a member liable for subscriptions up to 5*l.* in respect of each share, but rule 18 provides that profits shall be divided in proportion to the amount of subscriptions. It cannot be intended that a member should receive dividends in respect of sums paid in and then withdrawn, and it follows that "subscription" means the amount for the time being standing to the member's credit in respect of his shares. The shares therefore are only fully paid up to that amount. A complete withdrawal by a member of all his subscriptions would terminate his membership, but any withdrawal short of that only increases his liability in respect of his shares by the amount withdrawn. The suggestion that a withdrawal of part of the

(1) (1898) 78 L. T. 393, 396.

NEVILLE J. 1909

UNITED SERVICE SHARE PURCHASE SOCIETY, LIMITED, *In re.*

subscriptions is a withdrawal of a proportionate number of the shares could not prevail unless there was a special contract to that effect. There is no evidence of any such contract, and the entries in the society's share register are inconsistent with it.

In Meek's case it was argued that his death put an end to the contract on the analogy of a building society. But the cases are not analogous, for in building societies the liability of members is not fixed by the nominal amount of their shares. The position is more like that of a company under the Companies Acts, and s. 76 of the Companies Act, 1862, which makes the estate of a deceased member liable in a subsequent winding-up, is made applicable by s. 58 of the Act of 1893.

As to Sutton's case, by not withdrawing the 2*s.* 6*d.* paid on his share he retained all the rights and privileges of a member; he cannot escape the liabilities.

Clauson, in reply.

NEVILLE J. In this case I have arrived at the conclusion that in the main the contention of the official receiver is correct with regard to the liability of the members.

Under the Industrial and Provident Societies Act, 1893, I think there is no question that the liability of the members is governed by the nominal amount of the shares in respect of which they became members of the society. In the present society the shares were 5*l.* shares, to acquire which 2*s.* 6*d.* subscription on the share had to be paid together with an entrance fee of 3*d.*, and 6*d.* for a copy of the rules of the society. So that upon payment of 2*s.* 6*d.* plus 9*d.* with that intent a person became a member of the society in respect of one share, and thereupon came under a liability in certain contingencies to subscribe to the funds of the society 4*l.* 17*s.* 6*d.* beyond the amount of the original payment. The contingencies were calls by the committee of management, otherwise called the directors, or, I think, in case of liquidation, the demand by the liquidator for the contributions necessary to satisfy the claims under the liquidation.

The questions before me must depend upon the rules. Sched. II. to the Industrial and Provident Societies Act, 1893,

states what matters are to be provided for by the rules. [His Lordship read clauses 7 and 9 of that schedule.] Rule 5 is headed "Withdrawals." The words are: "A member may withdraw the whole or part of his subscriptions at any time, subject to one month's notice being given, and to the funds at the disposal of the society being sufficient. The directors shall have power to pay any sum on demand if they think fit. No share or shares shall be transferable." We have to consider what is meant by "subscription" in that rule. The schedule provides for withdrawal of shares and does not refer to the withdrawal of subscriptions. I was referred to a book by a learned author in which it was said that there was no distinction between "withdrawal of shares" and "withdrawal of subscriptions," which both mean the same thing. A general statement of that sort of course may or may not be true with regard to any particular case with which you have to deal. In some cases no doubt it is so; in other cases it is not so. The context must shew what the meaning of "subscription" is. There are two other rules which throw a light upon that point; the first is rule 2, which provides that a member shall not be allowed to hold more than forty shares, and the subscription shall not be less than 2*s*. 6*d*. on each share per month until the share is fully paid up, and the second is rule 18, which provides that the remainder of the profits shall be divided between all the remaining members in proportion to the amount of their subscriptions. There undoubtedly "subscriptions" does not mean the total amount subscribed upon the shares. In the first instance it refers to subsequent calls, and in the second place it refers to the amount of subscriptions standing to the credit of the member for the time being, because it is inconceivable that it should mean that where a member had paid subscriptions, which he subsequently withdrew, he was to share in the division of profits not in the proportion to the amounts standing to his credit in the society, but in proportion to the amount that he had subscribed to the society in the aggregate. With that assistance I endeavour to arrive at a conclusion as to what withdrawal of subscriptions means. I think it means what it says. These subscriptions are made on account of

NEVILLE J. 1909 — UNITED SERVICE SHARE PURCHASE SOCIETY, LIMITED, *In re.*

shares in respect of which the subscriber is a member of the society. The members are entitled, upon a month's notice, to withdraw the amount they have subscribed, but when they have withdrawn, how do they stand in relation to their shares? It is said they stand in this position, that they have paid upon the shares the total amount that they have subscribed, and that the amount paid upon the shares is not affected by the amount of withdrawal. Thus, if a member pays, on becoming a member of the society, 5*l.* upon a share, and a month afterwards, or immediately, with the consent of the directors, withdraws 4*l.* 10*s.*, he has discharged his total liability on the shares, and the amount unpaid on the shares is nil, and the amount subscribed is 5*l.* I do not think that can have been the meaning of the rules. Here again I think the amount subscribed is the amount for the time being subscribed, and when a subscription is returned to a member under this rule, it appears to me you can no longer say it has been paid upon the shares. It was once paid, it is true, but it has been returned, and, therefore, the amount paid by a member on the share is the amount that stands to his credit in the books in respect to that share. I think consequently that either by subsequent calls, or in a liquidation upon the call of the liquidator, a member of the society is bound to contribute the difference between the amount standing to his credit in respect of his shares at the time of the call or the liquidation and the nominal amount of those shares. It has been pointed out that there is in the Companies (Consolidation) Act, 1908, s. 40, a provision under which out of surplus profits the amount paid by shareholders upon their shares can be returned, and that there the Act specifically provides that the return of that capital shall increase the amount unpaid upon the shares. It seems to me that that only expresses what is implied under this Act and these rules, and that if a member withdraws part of his subscription upon his shares he withdraws it for all purposes, and thereby increases his contingent liability.

Now, the matter, I think, was dealt with by the society upon that footing. When a member subscribed for a certain number of shares, paying either the whole or some part, not

less than 2*s.* 6*d.*, in respect of each share, he was registered as a shareholder in respect of those shares, and subsequent withdrawals and payments in were respectively debited and credited to his account in respect of those shares. He was provided with a book in the nature of a pass-book which shewed the number of the shares in respect of which he was registered, and which dealt with both payments and withdrawals made in respect of those shares. It seems to me, therefore, that so long as the account was open, so long as there was anything remaining to the credit of the member in respect of the shares of which he was the registered holder, he remained a member of the society in respect thereof. Consequently, when the winding-up came the registered holders of the shares were liable for the whole nominal amount of the shares less the amount which was standing to their credit in respect of those shares in the books of the society.

Having arrived at that conclusion upon the construction of the Act and of the rules, it seems to me that that disposes of the questions raised in the cases which have been submitted to me, except with regard, first of all, to the case of the death of a member. The question is whether upon the death of a member his liability to subscribe the amount unpaid upon his shares is determined: in other words, whether he thereupon ceased to be a member of the society. I was referred to a decision concerning a building society under certain rules where it was held that in that case the death of a member put an end to his membership, and he thereupon ceased to be a member. The importance of this is that in the typical case which has been brought before me the death of the member occurred more than a year before the winding-up order, and consequently, if upon death he ceased to be a member, the provision of the Industrial and Provident Societies Act, 1893, s. 60, comes into operation, and his estate would be exonerated from payment. It appears to me that the case of any building society, and certainly that of the building society in the case to which I have been referred, does not bear a true analogy to the case of a society under this Act of 1893. The liability in the building society is limited in quite a different way, and in the case of the non-advanced members is limited to the

NEVILLE J. 1909 — UNITED SERVICE SHARE PURCHASE SOCIETY, LIMITED, *In re.*

arrears of the subscriptions which may be due at any particular time, and they are under no obligation to make up any fixed amount towards the funds of the society. Here, on the contrary, the liability of the members is fixed by the nominal amount of the shares, and prima facie the person who has become a member is liable to pay the amount equivalent to the nominal value of the shares which he holds. By the rules, in accordance with the Act, provision is made as to what is to be done in the case of death, and it remains in the discretion of the committee of management whether the interest of the member shall be transferred to the executors or whether the amount due to the deceased member shall be paid out. The two courses do not on ordinary occasions differ in their results to any great extent, because supposing the interest is transferred to the executors, the executors would then be able upon a month's notice to withdraw from the society, and really the only consideration for the committee of management would be whether the executors should be paid at the time or a month afterwards. It seems to me that the rules do not provide for the cessation of the membership at the death, and I do not think in the present case it can be said that the liability of the member determines upon his death. I think, therefore, that the executors are liable in respect of the assets of their testator to the extent of the unpaid amount of his shares.

There is one other point with which I have to deal; it is a small matter, but no doubt one of some peculiarity. Part of the business of the society consisted in making advances, but it made advances only to members, so that an advance could not be obtained without a payment of 2*s.* 6*d.* in respect of the share, and the usual 9*d.* for other expenses. Some persons consequently, and possibly in response to a prospectus to which I have been referred, took one share and obtained an advance, and in the case I have had before me the advance was repaid before the liquidation, but nothing was done with regard to the share. If I had evidence before me which would entitle me to come to the conclusion that the borrower demanded the withdrawal of his share and required the society to put an end to his membership, and that that had not been done, the conclusion

that I should have to arrive at might be different. But here there is no evidence to shew that the borrower desired to withdraw from the society. It may be that he regarded the payment of the 2*s.* 6*d.* as a mere incidental expense of the loan. The liability in these cases is, unfortunately, almost universally overlooked. On the other hand he might have thought he should want an advance at another time. At all events there is nothing before me to shew that he desired, or expressed the desire, to withdraw his 2*s.* 6*d.* from the society and to cease to be a member. I think, therefore, he is liable for the difference between the 2*s.* 6*d.* and 5*l.*, the nominal value of his share.

With regard to the other case of the borrower, the loan was not repaid until after liquidation, and I think, therefore, that is an a fortiori case. Indeed, it was not seriously argued that he could escape liability in respect of the share that he had taken in order to secure the money.

By consent the costs of all parties were ordered to be paid out of the assets.

Solicitors: *Crook, Milnes & Jones; Smith, Rundell & Dods.*

J. R. B.

NEVILLE J. 1909 *July* 8.

In re PECKHAM, DULWICH, AND CRYSTAL PALACE TRAMWAYS BILL.

[1909 P. 228.]

Statutory Company—Special Act—Tramways—Parliamentary Deposits—Time Limit for Completion of Works—Sale of Undertaking before Works completed—Successors in Title—Whether Undertaking "abandoned" by Company—Parliamentary Deposits and Bonds Act, 1892 (55 & 56 *Vict.* c. 27), *s.* 1, *sub-ss.* 1, 2, 3.

Sub-s. 1 of s. 1 of the Parliamentary Deposits and Bonds Act, 1892, which prescribes the manner in which moneys or securities paid or transferred into Court "to secure the completion by any company of any undertaking authorized by Parliament" shall be dealt with when "the undertaking has not been completed within the time limited in that behalf," means that the undertaking must be completed by the company within the time limit.

Where, therefore, a statutory company, before all the works authorized by its special Acts had been completed, sold and conveyed its incomplete undertaking to another statutory body, who had statutory powers enabling them in effect to complete the undertaking:—

Held, that the undertaking had not been completed by the company within the meaning of sub-s. 1 of s. 1 of the Parliamentary Deposits and Bonds Act, 1892, and also that the company had "abandoned" its undertaking within the meaning of sub-s. 2 of that section.

Held, also, that the result of the conveyance by the company of its undertaking to the other statutory body was to put an immediate end to the time limited by the company's special Acts for the completion of its undertaking by the company.

ADJOURNED SUMMONS.

This was an application that certain parliamentary deposits in Court as security for the completion by the London, Camberwell, and Dulwich Tramways Company (formerly the Peckham and East Dulwich Tramways Company) of their statutory undertaking might be distributed amongst the creditors of the company.

By the Peckham and East Dulwich Tramways Act, 1882 (45 & 46 Vict. c. ccxiii.), certain persons were incorporated by the name of "The Peckham and East Dulwich Tramways Company," and the company was authorized to construct the tramways

described in the Act. Sects. 6 and 7 of the Act contained provisions for dealing with a sum of 754*l.* Consols, that had been deposited in Court as security for the completion of the tramways, if the company should make default in completing the tramways within the time limit; and s. 36 limited two years for the completion of the tramways.

By the Peckham and East Dulwich Tramways (Extensions) Act, 1883 (46 & 47 Vict. c. ccxxvii.), the company were authorized to construct additional tramways. Sect. 19 of the Act limited a time for the completion of the tramways; and ss. 22 and 23 contained provisions as to the parliamentary deposit of 900*l.* Consols in Court under the Act similar to those contained in ss. 6 and 7 of the Act of 1882.

The Peckham and East Dulwich Tramways Act, 1885 (48 & 49 Vict. c. cxcix.), authorized the company to construct the additional tramways mentioned in the Act, and provided (s. 5) that no part of tramway No. 1 authorized by the Act should be constructed "unless and until Rye Lane shall have been widened to the satisfaction of the local and road authorities." Sects. 24 and 25 of the Act contained provisions as to the parliamentary deposit of 1239*l.* Consols in Court under the Act similar to those in ss. 6 and 7 of the Act of 1882; and s. 43 limited two years for the completion of the works.

The Peckham and East Dulwich Tramways Act, 1887 (50 & 51 Vict. c. clxxxiii.), recited the Acts of 1882, 1883, and 1885, and after reciting (inter alia), "Whereas certain of the tramways authorized by the Acts of 1882 and 1883 have been constructed but could not be opened with advantage to the public before the authorized tramway in Rye Lane had also been constructed but the formation of the last mentioned tramway has from time to time been delayed until Rye Lane is widened and it is therefore expedient that the time for opening those tramways for the conveyance of passengers should be revised and extended. And whereas it is expedient that other tramways authorized by the said Acts should be abandoned and so much of the money or stock deposited in respect thereof repaid or retransferred to the company," enacted:—

Sect. 6. "The time limited by the Act of 1885 for the completion

NEVILLE J. 1909 — PECKHAM, DULWICH, AND CRYSTAL PALACE TRAMWAYS BILL, *In re.*

and opening of the tramways authorized by that Act other than the tramways by this Act directed to be abandoned shall be and the same is hereby extended and enlarged until the expiration of one year from the 14th of August, 1887 . . . . provided that the time for completing so much of tramway No. 1 as was authorized by the said Act to be laid down in Rye Lane is hereby extended until the expiration of one year after the intended widening of Rye Lane is carried out."

Sect. 8 extended the time limited by the Acts of 1882 and 1883 for such of the tramways authorized by those Acts as were not authorized to be abandoned to August 10, 1888.

Sect. 9 empowered the company to abandon the formation of certain specified tramways.

Sect. 13 provided for payment out of so much of the Consols in Court as represented the tramways directed to be abandoned.

Sect. 17 changed the name of the company to "The London, Camberwell and Dulwich Tramways Company."

Difficulties arose as to the widening of Rye Lane, and in 1904 Rye Lane had not been widened and consequently tramway No. 1 had not been constructed, and in August, 1904, a receiver of the company's undertaking was appointed by the Court in an action against the company by its mortgage bond holders; and in December, 1904, the London County Council, under the powers of the London County Council (Tramways and Improvements) Act, 1904 (4 Edw. 7, c. ccxxxi.), acquired for 6500*l.* "the tramway undertaking of the company free from all charges debts claims demands liabilities and incumbrances . . . . but as from the passing of this Act (August 15, 1904) all rights powers and authorities in respect of the said undertaking conferred and liabilities imposed upon the company or their predecessors in title by the Peckham and East Dulwich Tramways Act, 1882, the Peckham and East Dulwich Tramways (Extensions) Act, 1883, the Peckham and East Dulwich Tramways Act, 1885, and the Peckham and East Dulwich Tramways Act, 1887, or any of them, shall be transferred to and vested in and may thereafter be exercised by the council." The Act of 1904 also empowered the council (amongst other things) to

widen Rye Lane and to lay a tramway therein, and limited seven years for the completion of the works authorized by that Act. The 6500*l.* was paid into Court in the mortgage bond holders' action and was applied in and towards payment of the principal interest and costs due to them, and the receiver was discharged. There remained, however, a balance due to the mortgage bond holders, and the company was insolvent.

Under s. 13 of the Act of 1887 the deposit funds in Court under the company's special Acts of 1882, 1883, and 1885 had been reduced by payments out in respect of the tramways that were authorized to be abandoned, and those funds were now represented by the following sums of Consols in Court, namely, 556*l.* 19*s.* 4*d.* under the Act of 1882, 416*l.* 11*s.* 9*d.* under the Act of 1883, and 340*l.* 14*s.* 5*d.* under the Act of 1885.

The provisions in the Acts of 1882, 1883, and 1885 dealing with the deposit funds in the event of the tramways not being completed within the time limit were common form, and are substantially reproduced in the Parliamentary Deposits and Bonds Act, 1892 (55 & 56 Vict. c. 27), which is a general Act, and enacts:—

Sect. 1. "(1.) Where in pursuance of any general or special Act of Parliament, or of any rules made thereunder, moneys or securities have been deposited with, or are standing in the name of, the Paymaster General to secure the completion by any company of any undertaking authorized by Parliament . . . . and the undertaking has not been completed within the time limited in that behalf, the High Court may, notwithstanding anything in any such general or special Act or rules, order that the moneys or securities (in this Act called the deposit fund), or any part thereof, be applied towards compensating any landowners or other persons whose property has been interfered with or otherwise rendered less valuable by the commencement, construction, or abandonment of the undertaking, or of any portion thereof . . . . and also, in the case of a tramway company, towards compensating the road authorities for the expenses incurred by them in taking up any tramway or materials connected therewith placed by the tramway company in or on any road vested in or maintainable by the road authorities, and in

NEVILLE J.
1909
PECKHAM, DULWICH, AND CRYSTAL PALACE TRAMWAYS BILL, *In re.*

making good all damage caused to such roads by the construction or abandonment of the tramway.

"(2.) Subject to payment of any such compensation, and notwithstanding any provision as to forfeiture to the Crown, the High Court may, if a receiver has been appointed, or the company is insolvent and has been ordered to be wound up, or the undertaking has been abandoned, order that the deposit fund or any part thereof be paid or transferred to the receiver or to the liquidator of the company, or be applied as part of the assets of the company for the benefit of the creditors thereof.

"(3.) Subject to such application as aforesaid the High Court may, after such public notice as to the Court seems reasonable, order that the deposit fund or any part thereof be paid or transferred to the depositors or the persons claiming through or under them."

An unsatisfied mortgage bond holder of the company, who was also a large unsecured creditor, now applied under the Act of 1892 that the aforesaid sums in Court might, subject to all proper inquiries being made, be applied as part of the assets of the company for the benefit of the creditors thereof.

Christopher James, for the applicant. The Court has jurisdiction to entertain the application, as there are no other means by which the creditors of the company can obtain the money to which they are entitled: *In re Widnes Ry. Co.* (1) No portion of the tramways directed to be abandoned by the Act of 1887 has been constructed, and therefore no landowner or other person has to be compensated for injury to his property. It is only a question of the rights of the creditors. The company can never complete its undertaking, because it has conveyed it to the London County Council. It has in effect abandoned its undertaking and put an end to the time limit. A special abandonment Act is not necessary: *In re Torrington and Okehampton Railway Bill.* (2) The company now can never fulfil its obligations under its special Acts and has brought itself within the provisions of the Act of 1892; and if the time for dealing with the deposit funds has not now arrived, it never will arrive.

(1) (1872) L. R. 15 Eq. 108. (2) [1907] 1 Ch. 186.

Edward Ford, for depositors. The Court has no jurisdiction to interfere before the time limited by the special Acts has expired: *Ex parte Chambers.* (1) Here the time limit is one year after the widening of Rye Lane, and that time has not arrived. There is no time limited for the widening of Rye Lane, and the London County Council, who are the successors of the company, will under their special Act of 1904 widen the lane and complete the tramway. They have taken over the undertaking "with all the rights powers and authorities of the company." The deposit fund is a security for the completion of the tramway by the council. The company by merely transferring its undertaking to the council did not abandon it.

Maugham, for the British Mutual Bank, who were mortgagees of the depositors, adopted the same line of argument. The provisions in the special Acts for dealing with the deposits were superseded by the Act of 1892, and that Act does not apply because the company is not in default. Completion by the London County Council must be treated as completion by the company, and the council will probably complete the tramway within the time limit. All the tramways authorized by the Acts of 1882 and 1883, other than those directed to be abandoned by the Act of 1887, have been constructed, and, assuming that the creditors of the company are entitled to the 340*l.* 14*s.* 5*d.* in Court under the Act of 1885, other persons than the creditors may be found entitled to the sums in Court under the Acts of 1882 and 1883, whether the company is insolvent or not.

Draper, for the company.

Christopher James, in reply. The provisions of the special Acts must be read with the Act of 1892. Completion by "any" company in the latter Act means completion by this particular company, and that event can never happen, because the Act of 1904 has made it impossible for the company to complete the tramway in any event. The deposits were to secure completion by this company, and that condition is not fulfilled by completion by another statutory body. Moreover, a receiver was appointed in the mortgage bond holders' action. The Act of 1892 says nothing about the company being in default, but the condition

(1) [1893] 1 Ch. 47.

NEVILLE J. 1909 — PECKHAM, DULWICH, AND CRYSTAL PALACE TRAMWAYS BILL, *In re.* —

is that the time limit has expired. The creditors are clearly entitled to the 340*l.* 14*s.* 5*d.*, but it may be that they are not entitled to the whole of the other two sums.

NEVILLE J. This case raises a somewhat peculiar point under the Parliamentary Deposits and Bonds Act of 1892. I think that the decision of the point very much depends upon whether the use of the words "the completion by any company," followed by the words "and the undertaking has not been completed within the time limited" in sub-s. 1 of s. 1 of the Act, imports the completion of the undertaking by the company, that is to say, involves the introduction of the words "by the company" after the words "and the undertaking has not been completed."

Now the facts here were that the tramway company, their tramway being incomplete, at all events with regard to the Rye Lane section which had not been commenced, under the London County Council (Tramways and Improvements) Act, 1904, sold their tramway undertaking free from all charges, debts, liabilities, and incumbrances to the London County Council for a sum of 6500*l.* It is not denied that the undertaking has not been completed by the tramway company, but it is said that the time limited for completion with regard to Rye Lane section has not expired inasmuch as the time fixed was a period of one year from the widening of Rye Lane, and that event has not taken place. Then there is the further question whether under sub-s. 2 of s. 1 of the Act of 1892 it can be said that "the undertaking has been abandoned" by reason of its transfer from the tramway company to the London County Council. Now I think that the security under the Act of 1892 was a security for the completion by the company of any undertaking, and that the words "has not been completed within the time limited" must mean that the undertaking has not been completed "by the company" within the time limited. What was the time limited? It seems to me that, whatever the time limit was, the effect of the London County Council Act of 1904 was to put an end to the time within which the tramway company could complete its undertaking, and that the immediate result of the

transfer was to put an end to the time within which the company could complete its undertaking, because its power to complete was then gone. The facts, therefore, do appear to me to bring the case within the words "the undertaking has not been completed within the time limited." Then with regard to the abandonment of the undertaking I come to the same conclusion. It seems to me, the undertaking being incomplete, and the company having sold and conveyed it to the London County Council, the company have, so far as they are concerned, abandoned the undertaking. I hold, therefore, that the applicant is entitled to an inquiry in the usual form under sub-s. 2 of s. 1 of the Act of 1892 as to the 340*l.* 14*s.* 5*d.*, after, of course, taking such inquiries as may be necessary to satisfy sub-s. 1 of s. 1 of the Act with regard to the claims (if any) of landowners and road authorities. As there appears to be a doubt as to the parties entitled to the other two sums in Court, the summons had better stand over for further evidence, and the matter can come on again, for further argument if necessary, when the parties are ready.

Solicitors for applicant: *Lingard & Leach.*
Solicitor for depositors: *S. S. Seal.*
Solicitors for mortgagees: *White & Leonard.*
Solicitors for company: *Burchells.*

H. L. F.

NEVILLE J.
1909
July 8.

In re HILTON.
GIBBES *v.* HALE-HINTON.

[1909 H. 1262.]

Will—Construction—Absolute Trust for Conversion—Power to retain Investments made by Testator—Trustees unable to agree—Investment Clause—Companies "in the United Kingdom"—Companies registered in England but operating abroad.

Where a will contains a trust for conversion with a power to retain investments existing at the date of the will, and the trustees are not unanimous as to the retention of some of the investments made by the testator, the trust for sale prevails and the investments must be sold, although such investments are within the investment clause in the will.

A testator authorized his trustees to invest in the stocks, shares, or securities of "any company in the United Kingdom":—

Held, that a limited company registered in England and having its head office in England, where its directors met to manage the affairs of the company, was a "company in the United Kingdom" within the meaning of the investment clause, although its property was situate abroad and its operations were abroad.

Adjourned Summons.

The testator, James Hilton, died on September 19, 1907, having by his will dated September 19, 1902, appointed the two plaintiffs and the first two defendants (one of whom was his daughter) to be the executors and trustees of his will, and thereby bequeathed to them the residue of his personal estate upon trust to call in, sell, and convert into money such parts thereof as should not consist of money, with power to postpone such sale and conversion for such period as the trustees or trustee might think proper, and also with power to retain as permanent investments any shares or stocks in any public company, whether incorporated or not, or any bonds or debentures of any such company or of any public body whatsoever, or any colonial or foreign bonds or any securities or investments whatsoever, of or to which he might be possessed or entitled at the time of his death, but nothing therein contained should authorize the trustees or trustee to invest any money in any other mode than thereinafter specially authorized; and the testator directed the trustees or trustee out

of the money to arise from the sale and conversion of his said personal estate and out of his ready money to pay his funeral and testamentary expenses and debts and the legacies thereinbefore bequeathed or by any codicil thereto, and to stand possessed of the residue of the said money upon trust to invest the same "in their or his names or name in any of the public stocks or funds or Government securities or bonds (not being payable to bearer) of the United Kingdom or India or the United States of America or any colony or dependency of the United Kingdom . . . . or in or upon the stocks funds shares bonds (not being payable to bearer) debentures mortgages or securities of any corporation company (except banking and insurance companies) or public body municipal commercial or otherwise in the United Kingdom or India or any other colony or dependency of the United Kingdom (but not in any other mode of investment) with power for the trustees or trustee with the consent of his said daughter to change such investments for others of a like nature." And the testator declared that the trustees or trustee should stand possessed of the said investments thereinbefore directed to be made or authorized to be retained (thereinafter called the trust fund) and the annual income thereof upon trusts under which his said daughter was tenant for life, with a gift over in certain events to pay certain charitable legacies, with an ultimate trust of the corpus of the residue for his said daughter absolutely.

The testator died possessed of considerable personal estate, and the residue (after payment of his debts, testamentary and funeral expenses and immediate legacies) comprised (inter alia) investments made by the testator, which had not been called in and converted by his executors but were still standing in his name, of stocks and shares of companies and railways in Canada and South America and in the colonies, some of which were of a nature contemplated by the investment clause, and some of which were of a nature not contemplated by the investment clause. Amongst the latter category were stocks and shares of the Buenos Ayres Great Southern Railway.

Questions arose between the trustees as to the retention of some of these investments. The plaintiffs were of opinion that

NEVILLE J. 1909 HILTON, *In re.* GIBBES v. HALE-HINTON.

they should be converted, but the first two defendants desired that they should be retained, especially the first defendant, as the conversion of the investments in question would materially reduce her income as the tenant for life of the testator's residuary personal estate. This summons was therefore taken out to obtain the direction of the Court whether, if one or more of the trustees wished that any investment made in the testator's lifetime should be sold, the other trustees or trustee were bound to concur in the sale thereof. Another question was, what was meant by a company "in the United Kingdom or India or any other colony or dependency of the United Kingdom"? There was evidence that many of the investments in question were stock and shares of limited companies whose registered offices were in the United Kingdom, which were their head offices, where their board of directors met, and that, although the property of the companies was situated in a foreign State or the Colonies where their operations were conducted, their control and management was altogether directed from the United Kingdom, and that the stocks and shares of the said companies formed the most stable and well invested part of the testator's estate.

Percy Wheeler, for the plaintiffs. There is an absolute trust for conversion, and there is a power to retain investments made by the testator, but the trust for sale is an overriding trust. Trustees must be unanimous in the exercise of their discretion, and if they cannot agree on the retention of any investment it must be sold: *In re Roth.* (1) The plaintiffs do not ask the Court to decide whether or not the investments in question should be retained, and they do not say that the investments are not within the investment clause. But they think that these investments are a little hazardous and that they should be sold, and it is submitted that the Court will not interfere with their discretion: *Tempest* v. *Lord Camoys.* (2) On the second point there is no direct authority. The companies in question are registered in England. Their directors meet here, although in some cases there are local committees abroad who manage the

(1) (1896) 74 L. T. 50; [1896] W. N. 16.

(2) (1882) 21 Ch. D. 571.

companies' business out there; the meetings of their shareholders are held here and their dividends are paid here, and the question is whether companies so constituted are "companies in the United Kingdom" within the meaning of the investment clause. It is submitted that the decisions under the Income Tax Acts, in cases where companies registered here are held assessable to the duty, afford an analogy: *San Paulo (Brazilian) Ry. Co.* v. *Carter*. (1)

NEVILLE J. 1909 HILTON, *In re.* GIBBES *v.* HALE-HINTON.

H. E. Wright, for the first two defendants. The principle of *Tempest* v. *Lord Camoys* (2) is not disputed, but the facts here are different. The plaintiffs seek to read the trust for conversion and the power to retain investments separately, whereas they should be read together. It is a trust modified by a power, and not an original power, as in *Tempest* v. *Lord Camoys*. (2) The trust for sale does not necessarily control the power. In the case of *In re Roth* (3) the Court was dealing with securities to bearer, which were not authorized by the investment clause. The question here turns mainly on the South American securities, which were investments made by the testator and are some of the best investments of the estate, and are within the investment clause in the will. Their conversion will materially affect the income of the tenant for life. The testator, in the exercise of his discretion, thought well of these investments, and his trustees have the same discretion.

[On the second point he was stopped.]

C. Garnett, for the charities, was satisfied with the existing investments and did not desire a change.

NEVILLE J. I think that, where in a will there is a trust for the conversion of the personal estate with a power to retain investments existing at the date of the will, in the absence of unanimity between the trustees as to the retention of investments, the trust for sale operates and must be carried into effect. With regard to the second point, it seems to me that limited companies registered in the United Kingdom and having their head office in the United Kingdom, where their board of directors

(1) [1896] A. C. 31. (2) 21 Ch. D. 571.
(3) 74 L. T. 50; [1896] W. N. 16.

NEVILLE J. 1909 HILTON, *In re.* GIBBES *v.* HALE-HINTON.

meet to manage and control the affairs of the companies, are "companies in the United Kingdom" within the meaning of the investment clause, although the property of the companies is situated abroad and their operations are carried on abroad.

Solicitor for plaintiffs: *Julius Bertram.*

Solicitors for defendants: *Julius Bertram; Bridges, Sawtell & Co.*

H. L. F.

NEVILLE J. 1909 *July* 6.

In re LOUISIANA AND SOUTHERN STATES REAL ESTATE AND MORTGAGE COMPANY.

Company—Practice—Reduction of Capital—Lost Capital—Evidence of Loss—Companies Act, 1877 (40 & 41 *Vict. c.* 26), *s.* 3—*Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, c. 69), *s.* 46.

On a petition under the Companies (Consolidation) Act, 1908, for confirmation of a reduction of capital by cancelling paid-up capital which is lost or unrepresented by available assets evidence that the capital is lost or so unrepresented is not necessary.

In this case the company had passed a special resolution for reducing the capital of the company from its existing amount of 42,120*l.* (divided into 5000 ordinary shares of 7*l.* 15*s.* each and 674 preference shares of 3*l.* 10*s.* each) to 17,500*l.*, divided into 5000 shares of 3*l.* 10*s.* each. It was proposed to effect this reduction by writing off as lost 3*l.* 6*s.* 6*d.* on each ordinary share and returning 18*s.* 6*d.* per share to each ordinary shareholder, and returning the whole amount of their shares to the preference shareholders. These returns were to be made out of the proceeds of the sale of certain real estate which the company did not desire to reinvest. The resolution had been duly passed and confirmed by unanimous votes of the shareholders. This was a petition for the confirmation of the proposed reduction. The inquiry for creditors which is required when any money is returned to shareholders had been directed and made, and the Master had certified that there were no creditors unpaid. No evidence had been filed that the capital proposed to be written off was lost or unrepresented by available assets.

Vernon, for the company (the petitioners). In *Poole* v. *National Bank of China, Ld.* (1) Lord Macnaghten stated in his judgment that evidence on this point was unnecessary. After referring to the judgments in *British and American Trustee and Finance Corporation* v. *Couper* (2) he says: "Such being the views expressed in this House without any dissent or qualification, I was surprised to hear it argued that the Court has no jurisdiction to entertain a petition for the reduction of capital unless it be proved that the capital which the company proposes to cancel is lost or unrepresented by available assets"; and a little further on he says: "The condition that gives jurisdiction is not proof of loss of capital or proof that capital is unrepresented by available assets, or that capital is in excess of the wants of the company. The jurisdiction arises whenever the company seeking reduction has duly passed a special resolution to that effect." Notwithstanding those observations, the practice continued to be to require evidence of loss when the loss was the ground for the reduction (Buckley on the Companies Acts, 9th ed. pp. 132, 133), but that was under the Act of 1877. (3) The Consolidation Act of 1908 uses much wider words (4), which seem to have been

(1) [1907] A. C. 229, 238, 239.

(2) [1894] A. C. 399.

(3) Companies Act, 1877, s. 3: "The word 'capital' as used in the Companies Act, 1867, shall include paid-up capital; and the power to reduce capital conferred by that Act shall include a power to cancel any lost capital, or any capital unrepresented by available assets, or to pay off any capital which may be in excess of the wants of the company; and paid-up capital may be reduced either with or without extinguishing or reducing the liability (if any) remaining on the shares of the company, and to the extent to which such liability is not extinguished or reduced it shall be deemed to be preserved, notwithstanding anything contained in the Companies Act, 1867."

(4) Companies (Consolidation) Act, 1908, s. 46: "(1.) Subject to confirmation by the Court, a company limited by shares, if so authorised by its articles, may by special resolution reduce its share capital in any way, and in particular (without prejudice to the generality of the foregoing power) may—

"(*a*) extinguish or reduce the liability on any of its shares in respect of share capital not paid up; or

"(*b*) either with or without extinguishing or reducing liability on any of its shares, cancel any paid-up share capital which is lost or unrepresented by available assets; or

"(*c*) either with or without extinguishing or reducing liability on any of its shares, pay off

NEVILLE J. 1909 LOUISIANA AND SOUTHERN STATES REAL ESTATE AND MORTGAGE COMPANY, *In re.*

intended expressly to confirm Lord Macnaghten's view. It is submitted that evidence should not now be required in any case. But the present case is an unusually strong one for dispensing with it, for there are no creditors and no dissenting shareholders.

NEVILLE J. It would appear from the cases cited in Lord Justice Buckley's book that the judges required evidence of loss of capital in cases of reduction, because they considered that the cases declared by s. 3 of the Act of 1877 to be included in the power of reducing capital given by the Act of 1867 were intended to be exhaustive and to exclude the jurisdiction in every other case. It is impossible to put that construction on s. 46 of the Act of 1908. There a general power is given, and particular instances which are in effect the same as those in the Act of 1877 are introduced by the preface "without prejudice to the generality of the foregoing power." The only possible construction of those words is that the power of the company to reduce capital is not limited to the special cases mentioned. Evidence of loss of capital is therefore not necessarily required, and the resolutions may in this case be confirmed without any such evidence.

Solicitors: *Kingsford, Dorman & Co., for Harvey & Clarke, Leicester.*

---

any paid-up share capital which is in excess of the wants of the company,

and may, if and so far as is necessary, alter its memorandum by reducing the amount of its share capital and of its shares accordingly."

J. R. B.

EAST BARNET VALLEY URBAN DISTRICT COUNCIL *v.* STALLARD.

[1908 E. 572.]

C. A.
1909
SWINFEN EADY J.
July 22, 24, 26.
C. A.
Oct. 22, 23.

Sewers — Premises without District — Connection made by Local Authority — Subsequent Right to impose Terms for Continuance of Connection — New Water Closet — Internal Connection with existing Drain — Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 21, 22.

Where a local authority for valuable consideration permit an owner of premises without their district to connect the drains of those premises with their sewers, or where they themselves make the connection, without imposing terms upon the owner under s. 22 of the Public Health Act, 1875, they cannot afterwards impose terms for the continuance of that connection.

Attorney-General v. *Clerkenwell Vestry*, [1891] 3 Ch. 527, and *Brown* v. *Dunstable Corporation*, [1899] 2 Ch. 378, applied.

A residential property, of which the dwelling-house was without the district of the plaintiff authority, but the lodge was within the district, had a system of drainage whereby the drainage from the house went into a cesspool with an overflow drain leading to a pond, the cesspool and pond both being within the plaintiffs' district, and the drainage from the lodge joined the overflow drain before it reached the pond. The pond having become a nuisance, the owner, at the instance of the plaintiffs, connected the overflow drain by a 9-inch pipe direct with a storm-water drain in the plaintiffs' district. The plaintiffs, without consulting the owner, subsequently connected the storm-water drain with a soil sewer, and ultimately connected the 9-inch pipe direct with the sewer. The defendant having bought the property, the plaintiffs required him to agree terms under s. 22 of the Public Health Act, 1875, for the continuance of this connection or provide other means for the disposal of his sewage, and claimed an injunction to restrain him from permitting the drainage of that part of his property which was without their district to discharge into their sewers until terms were settled :—

Held that, the connection having been already made, s. 22 no longer applied, and that the plaintiffs' claim failed.

Per Cozens-Hardy M.R. and Farwell L.J.: *Semble* inasmuch as the cesspool was within the district, the sewage in question was not foreign sewage and the owner was entitled to connect with the plaintiffs' sewers under s. 21.

Per Swinfen Eady J.: The internal connection of a new water closet with an existing drain is not a new connection with the sewer within s. 22.

Dictum of Byrne J. in *Graham* v. *Wroughton*, [1901] 2 Ch. 451, 454, not followed.

WITNESS ACTION.

The plaintiffs were the urban authority for the urban district of East Barnet.

C. A. 1909 — EAST BARNET VALLEY URBAN COUNCIL v. STALLARD.

The defendant was the owner and occupier of Heddon Court, formerly Belmont, situate partly in East Barnet and partly in Enfield. The mansion-house, stables, and certain outbuildings of the assessable value of 300*l.* were in Enfield, while a lodge and a building formerly a dairy of the assessable value of 15*l.* 15*s.* were in East Barnet.

The plaintiffs brought this action on July 20, 1908, asking for a declaration that the defendant was not entitled to cause any sewer or drain from any portion of Heddon Court without their district to communicate with any sewer of the plaintiffs' except on such terms and conditions as might be agreed on between him and them under s. 22 of the Public Health Act, 1875, or as in case of dispute might be settled at his option by a Court of summary jurisdiction or by arbitration in manner provided by that Act, and for an injunction restraining the defendant from permitting or causing the drains from the portion of Heddon Court without the plaintiffs' district to discharge into the plaintiffs' sewers until the terms and conditions of causing that communication had been so determined, and for damages being 10 per cent. per annum on 300*l.*, the assessable value of the portion without the district, from July 4, 1907.

The defendant relied on the fact that the connection had been made by or with the acquiescence of the plaintiffs many years ago without the imposition of any terms on the defendant's predecessor and contended that s. 22 was no longer applicable.

The premises formerly belonged to Hanbury, who held them for about forty years until his death on December 13, 1900. Before 1895 the house drainage went into a cesspool with an overflow drain leading into a pond, both being in the plaintiffs' district. The drainage of the lodge, stable, dairy, and farm buildings went along another drain which joined the cesspool overflow drain before it reached the pond. The cesspool was last cleaned out in September, 1894, but the liquid matter was pumped out monthly until the alterations of 1897 below mentioned. The overflow from the pond went into a storm-water drain (formerly an open ditch) along Cat Hill Road into Pymme's Brook.

In 1895 the pond became a public nuisance, and, at the instance of the plaintiffs' assistant surveyor, Hanbury connected the cesspool overflow drain direct with the storm-water drain by a 9-inch pipe, so that the pond was no longer fouled. This, however, resulted in transferring the nuisance to the road gullies and the brook.

In 1897 the plaintiffs, without consulting Hanbury, connected their storm-water drain with a soil sewer lower down the road, so that the cesspool overflow passed through the storm-water drain into the soil sewer, and it became unnecessary to pump the cesspool any longer.

On July 17, 1900, the plaintiffs gave Hanbury formal notice that, in consequence of a portion of Belmont without the plaintiffs' district being drained by a drain belonging to the plaintiffs (meaning the storm-water drain), which communicated with the plaintiffs' sewer in Cat Hill Road, and in consequence of there having been no settlement arrived at between Hanbury and the plaintiffs with regard to the terms upon which the portion without the district was to be drained, they requested him to state whether he desired the communication continued, and gave him further notice that they were willing that the communication should be continued on the terms charged for other premises without the district, namely, 10 per cent. per annum on the assessable value of the premises without the district, and if these terms, or other terms to be settled in manner provided by the Public Health Act, 1875, were not accepted, or if the continuance of the communication was not desired, they required him to provide for the disposal of the drainage of the portion without the district in some other manner so as not to cause the pollution of Pymme's Brook or otherwise create a nuisance.

On July 23, 1900, Hanbury replied: "The proposed charge for drainage is not a fair one as my pipe was laid down by permission of your surveyor. . . . ."

On August 2, 1900, Hanbury wrote: "I am advised that as the drain pipe from my cesspool was run into the East Barnet main sewer by permission of the Urban Valley Council's surveyor —(as a matter of fact I believe the connection was made without

C. A. 1909 EAST BARNET VALLEY URBAN COUNCIL v. STALLARD.

my consent being given)—they are not entitled to claim any compensation or rate from me. I am also advised that as my property lies in the Barnet district, I am entitled to drain the whole of my premises into the sewer of that district, free of charge."

These letters were read at the plaintiffs' meeting, but no further steps were taken.

Hanbury died on December 13, 1900.

Two years later, namely, in November, 1902, the plaintiffs extended their soil sewer further up the road and, without consulting Hanbury's executors, connected the 9-inch pipe direct with the sewer, instead of keeping the old connection with the storm-water drain which led to the sewer.

Two years later, in December, 1904, they served a fresh notice on Hanbury's executors, but no further steps were taken, and the drainage went on as before.

In June, 1906, the defendant bought the premises and converted them into a preparatory school for boys under fourteen. He enlarged the house considerably and put in extra baths and water closets. The cesspool was done away with, and all the drainage was connected with the 9-inch pipe. The stables and farm buildings were, however, pulled down, and the evidence shewed that the total drainage was, if anything, less than before.

The defendant moved into the new premises in April, 1907, and the boys followed in May.

On July 4, 1907, and March 4, 1908, the plaintiffs served the defendant with notices substantially similar to those served on Hanbury and his executors, requiring the defendant either to agree terms on which the communication was to be continued, or to provide another mode of disposal of the sewage, and on the defendant declining to act on the notices they brought this action.

There was no hostility between the parties, the action being simply brought to settle their legal rights.

The action came on for hearing before Swinfen Eady J. on July 22, 1909.

Micklem, K.C., and *Naldrett*, for the plaintiffs. The rights of owners within and without the district are regulated by ss. 21 and 22 of the Public Health Act, 1875. Sect. 21 provides that

"The owner or occupier of any premises within the district of a local authority shall be entitled to cause his drains to empty into the sewers of that authority on condition of his giving such notice as may be required by that authority of his intention so to do, and of complying with the regulations of that authority in respect of the mode in which the communications between such drains and sewers are to be made, and subject to the control of any person who may be appointed by that authority to superintend the making of such communications. Any person causing a drain to empty into a sewer of a local authority without complying with the provisions of this section shall be liable to a penalty not exceeding 20*l.*, and the local authority may close any communication between a drain and sewer made in contravention of this section, and may recover in a summary manner from the person so offending any expenses incurred by them under this section." Sect. 22 provides that "The owner or occupier of any premises without the district of a local authority may cause any sewer or drain from such premises to communicate with any sewer of the local authority on such terms and conditions as may be agreed on between such owner or occupier and such local authority, or as in case of dispute may be settled, at the option of the owner or occupier, by a Court of summary jurisdiction or by arbitration in manner provided by this Act."

The present case is within s. 22, which apparently gives the outside owner an absolute right to connect, subject to proper terms of payment, and contains no penalty or cutting-off clause: *Newington Local Board* v. *Cottingham Local Board.* (1) The terms of payment must no doubt be settled once for all, but there is nothing in the section which says that they must be settled before the connection is made or not at all. In the present case no terms were ever settled, and they ought now to be settled under the section.

The defendant has in fact made a fresh communication by connecting his new baths and water closets with the 9-inch pipe: *Graham* v. *Wroughton.* (2) He has also increased the burden on the sewer, both by those new connections and by abolishing the cesspool.

(1) (1879) 12 Ch. D. 725, 730, 733. (2) [1901] 2 Ch. 451, 454.

C. A. 1909 EAST BARNET VALLEY URBAN COUNCIL v. STALLARD.

Hon. Frank Russell, K.C., and *Sheldon*, for the defendant. The defendant has not caused any of his drains to communicate with the plaintiffs' sewer. The connection was made many years ago by or with the acquiescence of the plaintiffs, and s. 22 is no longer applicable.

The first connection was made by Hanbury in 1895, when at the plaintiffs' request the 9-inch pipe was run into their storm-water drain. The plaintiffs chose to use this drain for sewage, i.e., as a sewer, and the defendant is entitled to rely on this connection as a connection made by agreement within s. 22. The next connection was made by the plaintiffs themselves in 1897 without consulting Hanbury. This was the first connection with the actual soil sewer. No payment was demanded on either of these occasions.

Payment was first demanded in 1900 and at once repudiated by Hanbury, in spite of which the plaintiffs made a further connection in 1902 without consulting Hanbury's executors. Connections sanctioned and made cannot be interfered with—*Attorney-General* v. *Clerkenwell Vestry* (1); *Brown* v. *Dunstable Corporation* (2); *Eastwood Brothers, Ld.* v. *Honley Urban Council* (3)—even if the sewage is increased: *New Windsor Corporation* v. *Stovell.* (4)

In the present case the sewage is not increased, but that is really immaterial. The defendant's right is merely limited by the capacity of the 9-inch pipe already sanctioned. He has no doubt used the existing connection for his new baths and water closets. But that is not causing a drain to communicate with the sewer within s. 22. That section refers to the communication between the main drain, i.e., the 9-inch pipe, and the sewer, not to internal connections between the water closets and the 9-inch pipe. In *Graham* v. *Wroughton* (5) Byrne J. apparently thought that such an internal connection was causing a drain "to empty into" the sewer within s. 21, but his remarks were only dicta and do not in any case apply to the very different language of s. 22. There is a further point on the particular

(1) [1891] 3 Ch. 527, 534.
(2) [1899] 2 Ch. 378, 388.
(3) [1901] 1 Ch. 645.
(4) (1884) 27 Ch. D. 665.
(5) [1901] 2 Ch. 451, 454.

merits of this case. Before 1895 Hanbury had either acquired or was acquiring an easement to discharge his sewage into the storm-water drain by means of the pond overflow. The plaintiffs interfered with this easement or inchoate easement for their own purposes and authorized and made the connections of 1895 and 1897 respectively without imposing any terms of payment. In these circumstances they cannot fairly insist on the defendant paying for the use of their new system.

Micklem, K.C., in reply. *Attorney-General* v. *Clerkenwell Vestry* (1), *Brown* v. *Dunstable Corporation* (2), and *Eastwood Brothers, Ld.* v. *Honley Urban Council* (3) were decisions on s. 21 and do not apply. In *New Windsor Corporation* v. *Storell* (4) there was an express contract. In the present case there has never been any agreement.

The connection of 1895 was made with a storm-water drain, not with a sewer, and was not a communication within s. 22. In 1897 we turned the storm-water into our soil sewer, but that was not making a communication by agreement within s. 22. The sewage went into the storm-water drain and we had to dispose of it. In 1900 Hanbury refused to come to any agreement, and we had to do the best we could with the sewage. We made the direct connection in 1902. But where is there any agreement, express or implied, that we were to take this drainage for nothing? That is what the defendant has to shew. All he proves is that no terms were in fact settled. That is an entirely different matter, and it is our reason for bringing this action.

As to the point on the merits, there is no evidence that Hanbury had actually acquired an easement. Anything short of that is immaterial. There is no such right known to the law as an inchoate easement.

SWINFEN EADY J., after stating the facts and holding on the evidence that the amount of sewage passing through the drain was probably somewhat less, but at any rate not more, than before the alterations, continued:—The defendant resists the action. The position he takes up is this: "I have not made and

(1) [1891] 3 Ch. 527, 534.
(2) [1899] 2 Ch. 378, 388.
(3) [1901] 1 Ch. 645.
(4) 27 Ch. D. 665.

C. A. 1909 EAST BARNET VALLEY URBAN COUNCIL v. STALLARD. Swinfen Eady J.

do not wish to make any communication or to avail myself of any privileges conferred by s. 22 as regards causing any of my drains to communicate with the plaintiffs' sewer. That was done long ago. All I wish is that the state of things existing since 1897 should go on. I do not seek to do anything."

The plaintiffs do not desire and have never threatened or intended to cut off the drains, and the parties do not appear to be upon unfriendly terms. The plaintiffs have taken the proper course of bringing the matter to an issue by this action to have the legal right determined. They have not acted in a high-handed manner at all, or attempted to take the law into their own hands. Their case is that "The sewage is now being sent down into our district and the defendant ought to pay for it. True he pays rates in another district, but he sends his outside sewage into our district. We have to deal with it, and he ought to pay. We bring this action to have the matter determined." The defendant on the other hand takes the view that he has to pay rates in the district where he resides and that he ought not to pay twice over. The question is simply as to the legal rights.

Now it has been decided in at least two cases that where connections have been made, not for limited purposes, but for the purposes of general sewage, either by the permission or acquiescence of the local authority, they are not entitled to interrupt that communication. In *Attorney-General* v. *Clerkenwell Vestry* (1) Romer J. said: "The defendants had, before action brought, granted permission to make the communications between the houses and the main-pipes, and consented to those communications being used for the purposes for which, and as, they are now being used; and I cannot see that, having given that consent, the defendants could now cut off or stop up those communications; for this is not a case of permission to use them to pass pure water only."

Again in *Brown* v. *Dunstable Corporation* (2) Cozens-Hardy J. said: "There are other houses the connections of which with the sewers have been made with the consent or by the acquiescence of the defendants, and it is settled law that I cannot interfere with them: *Attorney-General* v. *Clerkenwell Vestry*." (1)

(1) [1891] 3 Ch. 527, 534. (2) [1899] 2 Ch. 378, 388.

The plaintiffs contended that those were decisions on s. 21, under which the owners or occupiers of premises within the district have an absolute right to drain into the sewer of the local authority, and that the same reasoning does not apply to s. 22. I cannot adopt that view. Under s. 22 the owner or occupier of premises outside the district of a local authority is authorized to drain into their sewers subject to terms and conditions to be agreed or to be settled by a Court of summary jurisdiction or by arbitration. The point to be agreed or settled is not whether the owner or occupier of premises without the district is or is not to be entitled to drain into the sewers, but merely the terms and conditions upon which he may do so. In these circumstances, when once the local authority have not only permitted and authorized the connection to be made, but have themselves made it, I do not see any distinction on this point between s. 21 and s. 22, and the decisions on s. 21 apply to s. 22.

It follows that the present case is not now within s. 22. There is a connection already made. The drains already communicate with the plaintiffs' sewer, and whatever permission or authority is conferred by s. 22 on any owner or occupier of premises without the district, the defendant does not seek to exercise it. He merely remains quiescent.

I must add that this is peculiarly a case in which, at this distance of time, the Court ought not to interfere. The plaintiffs have taken upon themselves to substitute their soil sewer for the previous drainage, whatever it was. The defendant's predecessor Hanbury had acquired, or was in the course of acquiring, some right or easement of drainage. Whatever the legal rights were before the plaintiffs interfered, the position was altered in 1897 when the plaintiffs took upon themselves to connect these drains with their own deep sewer. No doubt they thought it was of some advantage and right and proper to be done. Possibly they thought it would relieve the district from anything approaching a nuisance. Possibly they thought it better that no question should be raised as to smells arising in the neighbourhood, and therefore took the matter into their own hands. They stopped Hanbury from acquiring an easement. They turned the sewage and storm-water into their own sewer,

C. A. 1909

EAST BARNET VALLEY URBAN COUNCIL v. STALLARD.

Swinfen Eady J.

and when they extended the soil sewer they made a direct connection between the 9-inch pipe and that extended sewer.

Having altered the old system by these new connections, they cannot now insist that the defendant must pay for the use of the new system. They do not bring themselves within any section of the Public Health Act, 1875, that entitles them to relief.

It is contended that the defendant has really caused some new sewer or drain from his premises to communicate with the plaintiffs' sewer, because there are certain new water closets now connected with the 9-inch pipe. Such a case as that is not within s. 22. When once the defendant's main drain, i.e., the 9-inch pipe, has been made to communicate with the sewer of the local authority, slight additions and alterations in the internal arrangements of the premises are not fresh connections within s. 22.

In these circumstances the plaintiffs are not now entitled to any relief. The action fails and must be dismissed with costs.

G. R. A.

The plaintiffs appealed. The appeal came on for hearing on October 22, 1909.

Micklem, K.C., and *Naldrett*, for the plaintiffs. An owner in one district cannot carry his sewage into the sewers of another district without payment. There is no case which decides that where a local authority for limited purposes and under special circumstances have allowed an outside owner to make a connection with their sewers he can for all time drain into that sewer. The defendant has no prescriptive right, and if he has any right it must be a statutory right. The sections of the Public Health Act, 1875, which deal with this matter are ss. 21, 22, and 28. Sect. 21 deals with drains within the district, s. 22 deals with drains without the district, and s. 28 deals with arrangements between two adjoining districts. This case falls within s. 22. There never was any intention on the part of the plaintiffs to make a communication for the purposes of the total sewage of this property.

[COZENS-HARDY M.R. referred to *Attorney-General* v. *Clerkenwell Vestry* (1) and *Brown* v. *Dunstable Corporation*. (2)]

Attorney-General v. *Clerkenwell Vestry* (1), which was followed in *Brown* v. *Dunstable Corporation* (2), did not decide that in no case where a local authority have made a connection can it ever be cut off, but the ratio decidendi of that case was that the local authority had consented to the communication being used for the purposes for which it was then being used. In this case there has been no such consent. Nobody can drain into the plaintiffs' sewer except by agreement, and, no arrangement having been come to, the plaintiffs are entitled to insist that the defendant shall pay for the accommodation at the same rate as other outside owners. Moreover, those two cases were decided under s. 21, which is confined to owners within the district, and very different considerations apply when it is sought to drain into the sewers of an adjoining district. The plaintiffs have done nothing to preclude them from bringing this action: *Islington Vestry* v. *Hornsey Urban Council*. (3)

[COZENS-HARDY M.R. The cesspool being within the plaintiffs' district, this case is within s. 21 and not within s. 22.]

The sewage so far as it comes from that part of the premises which is without the plaintiffs' district is foreign sewage.

Hon. Frank Russell, *K.C.*, and *Sheldon*, for the defendant, were not called upon.

COZENS-HARDY M.R. This is an appeal from a judgment of Swinfen Eady J., and it is certainly an action of a very peculiar kind. Mr. Hanbury was the owner and occupier of a house which is now owned and occupied by Mr. Stallard, the defendant. That house, so far as the main part of the living rooms is concerned, was just beyond the boundary line between the plaintiff authority's district and the adjoining district, but the dairy and lodge were within the plaintiff authority's district. It was an old house which had existed for more than forty years, and its drainage was to a cesspool on the estate, that cesspool being within the plaintiff authority's district. The overflow from this

(1) [1891] 3 Ch. 527. (2) [1899] 2 Ch. 378.
(3) [1900] 1 Ch. 695.

C. A. 1909 EAST BARNET VALLEY URBAN COUNCIL v. STALLARD. Cozens-Hardy M.R.

cesspool went into a pond and ultimately found its way into a brook which is also within the district. Complaint was made that this caused a nuisance by reason of smell. That was after the plaintiff authority, the East Barnet Valley Urban District Council, came into existence. Negotiations took place between the surveyor of the East Barnet Council and Mr. Hanbury and his representative, and it was pointed out that the pond into which the overflow from the cesspool and also the refuse from the dairy and lodge went created a nuisance; and the result of these negotiations was that a suggestion was made that it would be better if Mr. Hanbury carried the pipes through the pond directly into the sewer of the plaintiff authority going down the road. Mr. Hanbury assented to that, and at his own cost continued the pipe through the pond into the road, and the authority by their own act connected it in the first instance with the storm-water sewer, and subsequently, when that was complained of, they made another communication into their main sewer, and that has been going on for many years. In these circumstances, Mr. Hanbury having died, and the defendant, Mr. Stallard, being the owner and occupier of this house, the authority say by this action, "You are not entitled to cause a drain from any portion of your premises situated without our district to communicate with any sewer of ours, except upon such terms as may be agreed upon under s. 22 of the Public Health Act," and they ask for an injunction on that footing. I ask myself what possible ground is there for that? Mr. Stallard is doing nothing at all; he is not seeking to make any fresh communication with the sewer. He or his predecessor had a system of drainage on his own property within the plaintiff authority's district, and the nuisance, so far as there was any, was caused by premises within the plaintiff authority's district; and it seems to me that in respect of that pond and that cesspool within the district there was a right to make the communication with the plaintiff authority's sewers upon terms to be arranged. Those terms were arranged, and then, by the act of the plaintiff authority themselves, the sewage, which ultimately arises to a large extent just over the border, for many years came within the border from this cesspool into the plaintiff

authority's own sewers; and for the plaintiffs now to turn round and say "Although you by arrangement with us many years ago expended money on the faith of our taking this sewage into our sewer, we will put an end to all this and will contest your right to drain into our sewers unless you choose to pay us 2*s.* in the pound upon so much of the rateable value of your property as is within the adjoining district," seems to me a proposition which cannot possibly be maintained. A permission, and a permission given for value—a permission given in my view as a matter of right, but, whether given as a matter of right or not, a permission given for value—cannot be revoked in the manner which is suggested.

This is not a case in which there has been any increase of burden thrown upon the plaintiff authority by reason of any changes which have been made. I accept, of course, on this point what Swinfen Eady J., who heard all the evidence, has said. He says that, although there have been slight changes made by Mr. Stallard, the drains have not been increased or substantially altered. New closets have been made, but the result of these changes is that there is no greater burden on the drains than before the alterations, and probably somewhat less. The defendant does not now wish to make a connection, or do anything to call in s. 22; he says all that was done long ago. The council say they do not desire and have never threatened or intended to cut off the connection. The defendant has to pay rates in respect of the district in which he resides, and if he has to pay this charge for the sewage he has to pay twice over.

I think the authorities have settled beyond question (and I only refer for the moment to my own decision in *Brown* v. *Dunstable Corporation* (1)) that, where a connection has been made by permission of the local authority, it cannot be cut off abruptly and without some new arrangement being made. If the plaintiffs can legally stop the connection between the defendant's drain and the sewer, so be it; they may or may not have a right. Certainly I think it is quite hopeless to ask this Court after this lapse of time, having regard to what has taken place, to restrain the defendant, Mr. Stallard, from continuing to allow

(1) [1899] 2 Ch. 378.

C. A. 1909

EAST BARNET VALLEY URBAN COUNCIL v. STALLARD.

the drainage from his house, which ever since the existence of the house has found its way into the plaintiff authority's district, to go into the drain.

In my opinion the decision of Swinfen Eady J. was perfectly right, not only on the grounds on which he put it, but also on the further ground which I have ventured to suggest, and this appeal must be dismissed with costs.

FLETCHER MOULTON L.J. I entirely agree. The appeal seems to me to fail upon many grounds, but I will shortly indicate one which, in my opinion, is a fatal objection to the plaintiffs' case. Provision for the drainage from the lodge buildings is admittedly part of the statutory duty of the plaintiff authority. With full knowledge of all the circumstances they make that provision by making communication between a drain which is partly on the defendant's premises and their own sewer, knowing well that that drain receives sewage from a cesspool which I will assume for the purposes of my judgment to be foreign sewage. With full knowledge of that fact they elect to discharge their statutory duties by making this communication. The plaintiffs by their counsel admit that they cannot close that communication; and so they come and ask us to order the defendant to close some communication on his premises of which they were aware when they joined up with the drain. I ask myself what possible right have we to compel the defendant to do that? He has done nothing, but has merely allowed the authority with full knowledge of the circumstances to do what they chose to do. We have no right to make any such order; and therefore in my opinion the whole claim of the plaintiff authority fails.

FARWELL L.J. I am of the same opinion. The defendant in 1906 bought a house more than forty years old in the adjoining district—the Enfield district. That house had originally been drained by a cesspool in the East Barnet district into which all the buildings drained. In 1897 there had been a complaint, in the time of the defendant's predecessor in title, and an arrangement had been made by which the cesspool which was in the appellants' district had been piped at the then owner's expense and joined

on to the sewer with the assent of the appellants under s. 21. It is settled beyond dispute that, that being done, the authority cannot now revoke the permission which they then gave. It has been found that there has been no addition to the amount of sewage matter which comes down into this drain and thence into the sewer. The local authority themselves in 1902, for their own convenience and without any communication with the predecessor in title of the defendant, put down further drainage and continued the sewer further up the road, and yet they now contend that the defendant is bound to have recourse to s. 22 of the Public Health Act. In my opinion s. 22 has absolutely nothing to do with it. The defendant is in the position of being able to say "I bought the house. I made no alteration, it stands now exactly as it has stood for many years, and I desire to do nothing whatever." It is admitted that the authority cannot cut off this connection; and what possible ground they have to ask this Court to interfere I entirely fail to see. I agree that this appeal should be dismissed with costs.

Solicitors: *Byfield & Son; Ernest Bevir.*

H. B. H.

C. A
1909
JOYCE J.
Jan. 27;
Feb. 2, 3, 10, 11, 17;
March 13.
C. A.
Oct. 15, 18.

HULBERT *v.* DALE.

[1908 H. 1890.]

Easement—Right of Way—Presumption of Lost Grant—Inclosure of Common Land—Award of Right of Way—Non-user—User of other Road on Servient Tenement—Living Memory—Claim by Prescription not available—Unity of Possession—Prescription Act, 1832 (2 & 3 *Will.* 4, *c.* 71), *s.* 2—*Prescription at Common Law—Commencement of Easement.*

By an inclosure award in 1804 certain common lands were allotted to three adjoining owners, including the respective predecessors in title of the plaintiff Hulbert and of the defendant's lessor, and a private carriage road was awarded to the same persons leading from a certain named point to the defendant's farm. The awarded road was never used or even set out, and part of the homestead and outbuildings of the plaintiff's farm had stood for many years upon part of the admitted site of the awarded road. The evidence shewed that, until the commencement of the dispute giving rise to this action, the defendant and his predecessors in title or occupation had, for a period extending as far back as living memory went, openly and uninterruptedly used a private road running across part of the plaintiff's farm and in a direction parallel to the admitted course of the awarded road. There had been unity of possession of the plaintiff's and defendant's farms from 1889 to 1905. In an action by the plaintiff Hulbert and his tenant for an injunction to restrain the defendant from using the road in question:—

Held, that in the circumstances and on the evidence this was a case in which a lost grant of a right of way over the road in dispute ought to be presumed, and that consequently the action failed.

Decision of Joyce J. affirmed.

Witness Action.

The plaintiff W. Hulbert was the owner in fee simple of Crown Farm, Walton-on-Thames, and the plaintiff H. M. Dale was his tenant in occupation of the farm.

The defendant Harvey Dale was the occupying tenant of a neighbouring farm known as Fishmore Farm, situated to the north-west of Crown Farm.

Fishmore Farm gained access to a lane called Cottimore Lane, which led away in a south-westerly direction, by means of a road (hereinafter called "the undisputed road") which, after leaving Fishmore Farm, ran at first in a south-easterly direction over the defendant's land, and then turned sharply to the south-west

and ran over the plaintiffs' land until it reached Cottimore Lane, close by a cottage belonging to the plaintiffs. At this point another road (hereinafter called "the disputed road") branched off in a south-easterly direction almost at right angles to Cottimore Lane and ran along the southernmost portion of the plaintiffs' land about one hundred yards away from the front of the Crown Farm homestead until it reached a gate opening into a lane leading, still in a south-easterly direction, into the public road to Moulsey called Ryden's Road.

In their statement of claim the plaintiffs alleged that the disputed road was their own private road, and that the defendant persisted in wrongfully using and trespassing upon the disputed road and in breaking down and injuring the gates and fences thereof, and in passing along the said road from Fishmore Farm to Ryden's Road with and without horses, cattle, and vehicles, and they claimed injunctions to restrain these acts.

By his defence the defendant asserted that he was entitled to use the disputed road under an award of the Inclosure Commissioners dated December 18, 1804, or alternatively by virtue of a lost grant, and counterclaimed for a declaration that he was entitled to a carriage road or right of way thirty feet wide across the plaintiffs' land in accordance with the award.

By the award in question the Commissioners awarded "unto the King's Most Excellent Majesty and unto Anna Isabella Elizabeth Fowke and Edward Peppin Esquire and unto the owners and occupiers of their several lands and grounds adjoining the Lower Common for the time being for ever one private carriage road of the width of thirty feet beginning at the south-west entrance of Field Common and leading under the south fences of the ancient inclosures of His said Majesty the said Anna Isabella Elizabeth Fowke and the said Edward Peppin to the farm of the said Anna Isabella Elizabeth Fowke called Fishmore Farm." The award then proceeded to allot various parcels of land to the King, A. I. E. Fowke, and E. Peppin.

The award plan shewed by dotted lines a road running from Fishmore Farm in a south-easterly direction to Ryden's Road parallel with and about one hundred yards to the north of the disputed road and through the land then and now belonging to

C. A. 1909 HULBERT v. DALE.

Crown Farm. It was common ground between the parties at the trial of this action that the dotted lines indicated the site of the awarded way.

The predecessor in title of the plaintiff Hulbert had acquired Crown Farm from the Crown; and Anna Isabella Elizabeth Fowke, referred to in the award, was the predecessor in title of the defendant's landlord, who was the present owner in fee of Fishmore Farm. With the exception of a period of six years from 1889 to 1905, when both farms were in the occupation of the same tenants, there had not been either unity of possession or unity of ownership of the two farms since the date of the award.

It did not appear that the awarded way had ever been used or made up or even set out, and in fact for a period of some sixty or seventy years trees had been growing at places on the site enclosed by the dotted lines on the award plan, and some of the outbuildings and part of the structure of Crown Farm itself and part of Edward Peppin's house, Holly Lodge, which was to the south-east of Crown Farm and near Ryden's Road, had been erected on or across the space between the dotted lines.

The evidence at the trial shewed that the occupiers of Fishmore Farm had uninterruptedly used the disputed road for as far back as living memory went, and it also shewed that to a certain extent tradespeople and others wishing to get from Cottimore Lane to Ryden's Road had been in the habit of using the disputed road.

Macmorran, K.C., and *Gatey*, for the plaintiffs. We submit that at a very early date the awarded road was disused or abandoned by the owner and occupier of Fishmore Farm, and the undisputed road was made partly over land belonging to Fishmore Farm and partly over land belonging to Crown Farm, giving for the first time to Fishmore Farm a right of way out to Cottimore Lane. That would account for the fact that it runs partly over land belonging to Crown Farm; otherwise there could have been no necessity for making the undisputed road.

The Court is asked to presume a lost grant for all purposes. That will be a very serious thing for the plaintiffs, and we submit there is no evidence whatever of this way as of right to entitle the Court to presume a lost grant. In *Goldsmid* v. *Great Eastern*

Ry. Co. (1), approved in *Hampstead Corporation* v. *Midland Ry. Co.* (2), the parties were held to have waived their right granted to them under a charter, and what is there inconsistent in this case with a waiver by the persons interested of their right to the awarded road? The way was never used, and that shews that the people for whose benefit it was granted did not want it. The way was never even made up, and that is the best evidence of abandonment. The general principle relating to abandonment is stated in *Moore* v. *Rawson* (3) and applies to this case.

Younger, K.C., and *Boome*, for the defendant. There is no foundation for the plaintiffs' theory. All the people mentioned in the award wanted to get to both Cottimore Lane and Ryden's Road, and the true view is that they had access given them to both Ryden's Road and Cottimore Lane. We submit that the disputed road was substituted and used for the awarded road. With regard to the question of abandonment, it was held in *Lovell* v. *Smith* (4) that the discontinuance to use an old highway in consequence of an agreement for the substitution of an old prescriptive way was no evidence of abandonment. It is always a question of intention, and mere non-user when the easement is not required is not sufficient: *James* v. *Stevenson* (5); *Young* v. *Star Omnibus Co.* (6) There was no abandonment in fact or intention to abandon the right of way given by the award. We claim the right to use the disputed road, not by prescription, but by virtue of a lost grant. We cannot claim under the Prescription Act because of the unity of possession from 1889 to 1905: *Onley* v. *Gardiner* (7); *Damper* v. *Bassett* (8); and we cannot claim by prescription at common law, because we claim by virtue of the award of 1804, and that is not consistent with immemorial user. We therefore ask the Court to presume a lost grant. The doctrine of presuming a lost grant was recognized by Lord Blackburn in *Dalton* v. *Angus.* (9)

We have shewn user of the disputed road by witnesses for periods varying from thirty-one to fifty-one years previous to

(1) (1883) 25 Ch. D. 511.
(2) [1904] 2 K. B. 802; on appeal, [1905] 1 K. B. 538.
(3) (1824) 3 B. & C. 332.
(4) (1857) 3 C. B. (N.S.) 120.
(5) [1893] A. C. 162.
(6) (1902) 86 L. T. 41.
(7) (1838) 4 M. & W. 496.
(8) [1901] 2 Ch. 350.
(9) (1881) 6 App. Cas. 740, 811.

C. A. 1909 HULBERT v. DALE.

1889, when the unity of possession commenced, and we submit that that is sufficient to enable the Court to presume a lost grant. If the defendant does not succeed on his defence, then under the counter-claim he claims an awarded road.

Gatey, in reply. The defendant has attempted to shew uninterrupted user by the owners and tenants of Fishmore Farm, but if he has shewn anything at all, he has shewn a user by the public wholly inconsistent with the private right of way claimed by him.

I submit that the nature of the acts done by the owner of Crown Farm and acquiesced in by the owners and occupiers of Fishmore Farm shew an intention on the part of the latter to abandon the awarded way: *Reg.* v. *Chorley* (1); and this is a much stronger case than *Lovell* v. *Smith* (2) and *Young* v. *Star Omnibus Co.* (3) Applying *Moore* v. *Rawson* (4), if the Court is entitled to presume a lost grant, why should it not presume a lost release?

Cur. adv. vult.

March 13. JOYCE J. This is an action by the owner and occupier of Crown Farm, Walton-on-Thames, against the occupier of an adjoining farm known as Fishmore for alleged trespass in using a road along the side of a field, part of Crown Farm.

The defence is that the act complained of was done in exercise of a private right of way for which no grant can be produced. Upon reference to the sheet of the ordnance map containing these two farms there will be seen a road leading from Cottimore, or Cottimore Lane, in a north-easterly direction to Fishmore Farm, and ultimately reaching the farmhouse and homestead by a bend to the left or north-west. The right of the defendant and the owners of Fishmore to use this road, a part of which lies within the boundaries of Fishmore Farm itself, is undisputed, and I may for convenience and brevity call it "the undisputed road." It passes close by a cottage near which the map shews another road branching off at right angles to the south-east, passing at a distance of about one hundred yards from the front of the Crown farmhouse and homestead until it reaches

(1) (1848) 12 Q. B. 515.
(2) 3 C. B. (N.S.) 120.
(3) 86 L. T. 41.
(4) 3 B. & C. 332.

a gate opening into the end of a lane which leads to Ryden's Road, that being a public road, the general direction of which is from south-west to north-east. The road from the cottage to the gate into the lane is the road in dispute, and at the trial before me was commonly referred to as "the disputed road."

The case, I think, is peculiar in this, that each party desires me to presume or imply the existence of some agreement made about one hundred years ago between the owners of Crown Farm, which, as I have said, includes the site of the disputed road, and the owners of Fishmore Farm, who claim to use such road; and the explanation is this: By an inclosure award dated December 18, 1804, there was awarded unto the King's Most Excellent Majesty and to Mrs. Fowke and Edward Peppin, Esquire, and to the owners and occupiers of the several lands adjoining the Lower Common for the time being for ever one private carriage road of the width of thirty feet, beginning at the south-west entrance of Field Common and leading under the south fences of the ancient inclosures of his said Majesty, the said Mrs. Fowke, and the said Edward Peppin to the farm of Mrs. Fowke called Fishmore Farm. Mrs. Fowke was at that time the owner of Fishmore Farm, as by the award appears. The King was then the owner of Crown Farm, since sold and now the property of the plaintiff Hulbert. Edward Peppin was the owner of a house and lands known as Holly Lodge, which lie to the south-east of Crown Farm, between it and Ryden's Road.

Now this awarded way was never made or, so far as appears, set out or actually used. If set out it would, I think, have passed directly in front of the house and homestead of Crown Farm, parallel to the disputed road at a distance of not more than about one hundred yards therefrom.

The defendant, not unnaturally, says, "If you, the plaintiffs, can deprive me of the use of the disputed road, then I and my landlord" (I assume the landlord to be behind the defendant really, and to be fighting this case with him, and therefore I speak of them sometimes as "we") "claim to have and use the awarded way." The plaintiffs make answer, "No, neither you nor your predecessors have ever used the awarded way; in fact,

C. A. 1909

HULBERT v. DALE.

Joyce J.

you have allowed us or our predecessors to advance the farm buildings and occupy with them at least a part of the site of the awarded way, and it is also now, at all events, obstructed by fences and other obstacles, and we contend that it has been abandoned and is extinguished." To this the defendant replies, "Without admitting that the awarded way has, in point of law, been abandoned so as to extinguish it, if I and my predecessors have not actually used or continued to use it, this was because we were, if not actually requested, at all events allowed to use the disputed road, which practically answered for us the same purpose as the awarded way. This user has been acquiesced in by you, the plaintiffs, and your predecessors, and an agreement must be implied, or presumed, substituting the disputed road for the awarded way; but, if you contest this, give us the awarded way over your land, with which we shall be content."

The plaintiffs seek to avoid this by a theory that what happened one hundred years ago was this, namely, that, instead of the awarded way leading to Ryden's Road, the owners of Crown Farm and the owners of Fishmore accepted, not the disputed road leading in the same direction, but the undisputed road leading to Cottimore, or Cottimore Lane. What equivalent, if any, Peppin or the owners of Holly Lodge accepted in lieu of their right to the awarded way is not even suggested.

There was a considerable conflict of evidence in the case, but, upon the whole, the result to my mind is that I come to the conclusion, and find as a fact, that for a period as far back as living memory extends the owners and occupiers for the time being of Fishmore Farm have openly and without interruption had an unquestioned user until quite recently, when the dispute arose, of the now disputed road, and I should have held such user to have been as of right (or by persons claiming a right thereto) but for the circumstance that during the period between the years 1889 and 1905 there was unity of possession (not of ownership) of the two farms, Fishmore and Crown Farms, both being in the occupation of the same tenant or tenants.

This being so, the defendant could not make good any claim to a right of way along the disputed road by prescription under the 2nd section of the Prescription Act. Nor could he, I

think, have succeeded upon a claim by prescription at common law, because I consider it to be tolerably plain, for various reasons, that the existence of the right of way claimed, if it does exist, originated and commenced at a date long subsequent to the reign of King Richard I.—in fact very little more than one hundred years ago. The defendant, therefore, has to base his claim upon the existence of a grant not produced, and he contends that it is a case for presuming a grant, now lost, of the right to use the disputed road.

I must say that it seems to me that if ever there was a case in which some such presumption ought to be made, this is the case. For I am tolerably certain that the owners and occupiers of Fishmore Farm have had the use of the disputed road without interruption and with the full knowledge of the occupiers, and presumably of the owners, of Crown Farm, who have acquiesced in such use possibly because of the existence of the right of the awarded way, which right, if enforced, would have been much more disadvantageous to Crown Farm than the user of the disputed road by the owners and occupiers of Fishmore Farm. The contention or suggestion (for it is hardly more) on the part of the plaintiffs that the agreement to be implied ought to be an agreement on the part of the owners of the Crown Farm to allow, instead of the awarded way to Ryden's Road, the use, not of the disputed road which leads ultimately to Ryden's Road, but of what I have called "the undisputed road," in another direction down to Cottimore, does not commend itself to my mind.

I cannot see any sufficient ground or reason for inferring the existence of such an agreement as this last mentioned. That such an agreement should have been made appears to me highly improbable, and the agreement, if any, to be implied or presumed must be consistent with and measured by the actual user, which I consider upon the balance of evidence to have been proved, of the disputed road. That such an agreement as the defendant asks me to presume or imply was practically made appears to me to be highly probable and consistent with all that has taken place: and what has happened is otherwise unexplained.

As Lord Herschell said in the House of Lords in the case of

C. A. 1909 HULBERT v. DALE. Joyce J.

Philipps v. *Halliday* (1), "Now I apprehend that where there has been long-continued possession in assertion of a right, it is a well-settled principle of English law that the right should be presumed to have had a legal origin if such a legal origin was possible, and that the Courts will presume that those acts were done and those circumstances existed which were necessary to the creation of a valid title."

In the circumstances of this case, therefore, I consider that I am justified in making the presumption I am asked to make of a legal origin to the right possessed by the defendant, the presumption, namely, of a modern grant since lost, or not produced.

Consequently I am of opinion that this action fails, and I dismiss it.

R. M.

C. A.

The plaintiffs appealed. The appeal came on for hearing on October 15, 1909.

An application was first made for leave to amend the statement of claim so as to raise a new case and to adduce further evidence in support of the amendment, but this having been refused, counsel then proceeded to read the evidence given in the Court below to shew that it did not justify the conclusions arrived at by the learned judge, and as no question of any legal interest was raised the case on appeal does not call for a detailed report.

Macmorran, K.C., *T. H. Carson, K.C.*, and *Bischoff*, for the appellants.

Younger, K.C., and *Boome*, for the defendant.

The COURT (Cozens-Hardy M.R., Fletcher Moulton and Farwell L.JJ.), without calling upon counsel for the respondent, dismissed the appeal. In their Lordships' opinion there was ample evidence—indeed the evidence was stronger than is usual in cases of this kind—to justify the learned judge in the Court below in presuming a legal origin to the right possessed by the defendant, namely, a modern grant since lost or not produced.

Solicitors: *Metcalfe, Hussey & Hulbert; C. T. Nicholls.*

(1) [1891] A. C. 228, 231.

W. C. D.

COATS *v.* HEREFORDSHIRE COUNTY COUNCIL.

[1907 C. 3602.]

C. A.
1909
EVE J.
Jan. 27, 28; *April* 20, 21, 22, 27, 28, 29; *May* 19.
C. A.
Nov. 3, 4.

Highway — Dedication — Presumption — Strip of Land running alongside Highway — Disused Tramway — Railway Company — Capacity to dedicate — Adjoining Owner — Right of Pre-emption — Combined Dedication — Admissibility of Evidence — Acts of Ownership.

A strip of land running alongside a high road and forming the site of a tramway, the user of which as such had been discontinued, was vested in a railway company, with power for the company at any time to use the strip for the purpose of their undertaking or to sell it, subject in the latter event to a right of pre-emption in the adjoining owners:—

Held, that the strip of land was capable of being dedicated by the company to highway uses, and that the company, so long as they did nothing incompatible with their statutory objects, were in a position to dedicate it for the purposes of a public right of way along it, and were not incapacitated from so doing by the right of pre-emption vested in the adjoining owners.

Held, further, upon the evidence of public user, that dedication of the land in question must be presumed.

On an inquiry whether part of a continuous strip of land has been dedicated to highway purposes, evidence that portions of the strip at each end of the part in dispute have been enclosed to the knowledge of, or without interference from, the highway authority is not admissible.

In appreciating the true effect of acts of ownership as rebutting an intention to dedicate, it is important to observe whether they are referable to the ownership of the soil rather than to any intention to exclude the passage of the public. In the former case they may tend to confirm the owner's general acquiescence in the continuous user of the surface by the public for highway purposes.

When an owner, alive to the necessity of evidencing his continued possession by periodical perambulations, and active in preventing encroachment upon or interference with his soil and in warning off trespassing wayfarers from parts of his land, at the same time permits, without protest or interference, the unrestricted passage of the public over the surface of the very soil of which he is asserting his ownership, there are cogent grounds for attributing to the public user an origin which, as against the owner of the soil, has established public rights.

WITNESS ACTION.

The following statement of facts is taken from the later judgment of Eve J. delivered on May 19:—

"By an indenture dated October 19, 1906, the Midland Railway Company, for the consideration therein mentioned,

C.A. 1909 — COATS v. HEREFORDSHIRE COUNTY COUNCIL.

conveyed to the plaintiff all their estate and interest in a narrow strip of freehold land on the side of the main road leading from Hereford to Hay, in the parishes of Whitney and Clifford, in the county of Hereford. The land so conveyed is described in the deed as 'the old tramway land,' and is more particularly—though not with absolute accuracy—delineated and described in the plan annexed to the deed, and is thereon coloured red.

"The plaintiff claims that he is entitled to enclose the land so purchased and to fence it off from the main road, and prior to the commencement of this action he had in fact so enclosed and fenced off a part of the land.

"The defendants contend that at the date of its purchase by the plaintiff the greater part of the land, including a portion enclosed and fenced by the plaintiff, was a public highway part of the main road between Hereford and Hay, and when the plaintiff had erected his fence they proceeded to remove that part of it which, according to their contention, was an encroachment on the highway.

"The plaintiff thereupon commenced this action, whereby he claims (1.) a declaration that the piece of ground enclosed by the fence so removed by the defendants is vested in him and is his property, free from any right of user as a road; (2.) a declaration that so much of the rest of the land as he has already fenced off is likewise vested in him, free from any such rights; (3.) a declaration that he is entitled to fence off the unfenced parts of the land in a similar manner; (4.) an injunction to restrain the defendants from entering upon the land and pulling down his fences; (5.) damages and costs.

"The defendants in their defence put the plaintiff to the proof of his title, and, alleging that the whole of the land forms part of the main road and is a highway, they justify the removal of the fence on the grounds that it was an encroachment on the highway and that its construction was of such a nature as to make it a source of danger to persons using the highway and consequently a nuisance.

"By counter-claim they claim in effect (1.) a declaration that the land from around which they removed the fence, and all the rest of the land, except that portion which they have left still

enclosed by the plaintiff's fence, is a public highway; (2.) an injunction to restrain the plaintiff from erecting any fence so as to be an obstruction to the highway or a nuisance; and (3.) 5*l*., the cost they incurred in removing that part of the plaintiff's fence which they took down.

"Upon these contentions issue was joined on July 11, 1908, and, pursuant to an order dated November 13, 1908, and made on an appeal from an order of mine refusing to transfer the action to the King's Bench Division for trial at the local assizes, whereby the Court of Appeal directed that the question of law 'whether during the relevant times there could have been dedication of the strip of land' should be first tried, I heard the arguments on that question on January 28 last and decided that during one portion at least of the relevant time there could have been dedication."

The arguments and judgment on this question are those first hereinafter set out.

"In order to demonstrate the relevancy of the matter with which I have just been dealing and to indicate its bearing upon the evidence adduced upon the issues of fact which I have now to decide, it is necessary that I should briefly review the history of the locus in quo.

"By an Act of George III., passed in 1811 (51 Geo. 3, c. cxxii.), a company known as the Hay Railway Company was incorporated with authority to make and maintain a railway or tramroad from a wharf on the Brecknock and Abergavenny Canal in the county of Brecon to a place called Parton Cross in the parish of Eardisley, which adjoins the parish of Whitney and is also in the county of Hereford. The course of the tramway was delineated in the deposited plan and book of reference mentioned in the Act, and full powers were conferred upon the company for acquiring the necessary land (limited to a breadth of ten yards, except in spots where passing places or landing stages were contemplated), for raising capital, and for levying and recovering tolls for the use of the tramroad; and then by s. 72 it was enacted 'That if any person or persons' except as therein mentioned 'shall ride, lead or drive, or cause to be rode, led or driven upon such railway or tramroad or any part thereof, any

C. A. 1909 — COATS v. HEREFORDSHIRE COUNTY COUNCIL.

horse, mare, gelding, mule or ass, or shall lead or drive or cause to be led or driven thereon any cow or other neat cattle, sheep, swine or any other beast or animal except only in directly crossing the same at places to be appointed for that purpose and for the necessary occupation of the respective farms through which the same railway may be laid, he she or they shall forfeit and pay to the said company of proprietors any sum not exceeding forty shillings.'

"The only other section I need refer to is s. 82, whereby the company were empowered and required at their own proper charges, after any land should be taken for the use of the tramroad, to divide and separate and keep constantly divided and separated the same from the adjoining lands with good and sufficient posts, rails, hedges, ditches, mounds, or other fences, in case the owner or owners of such adjoining lands should at any time desire the same to be fenced off.

"The tramway was duly constructed in accordance with the Act as amended by an Act passed in 1812 (52 Geo. 3, c. cvi.), to which I need not further refer. It extended to a length of about twenty-two miles, passing, for the most part, through private lands, but at some places, and in particular on the strip in dispute in this action, its course lay alongside the high road, separated only from the metalled portion of the high road by the grass margin usually to be found on the side of the highway.

"The track consisted of two parallel iron angle plates laid longitudinally on big blocks of stone, the gauge being about 3 ft. 6 in., and the space between the rails being ballasted in order to afford foothold for the horses which drew the waggons or trucks used. The tramroad was enclosed by fences on each side where it passed through private land, and where it ran by the side of the high road it was separated by a fence from the land adjoining it on the side away from the high road; the track, as a general rule, was on a level approximately with that of the metalled portion of the high road, but here and there, to preserve an easier gradient and to avoid unnecessary undulations, it was carried on a permanent way elevated a little above, or sunk a little below, the road level.

"The tramway served the requirements of a sparsely populated

agricultural district for some fifty years or so, but in 1865 its use was discontinued, the rails were taken up, and, either at the same time or within a few months after, the stone blocks to which the rails had been fastened were removed and utilized for other purposes. The discontinuance and dismantling of the tramway was the work of the Hereford, Hay, and Brecon Railway Company.

"Under an Act of 1860 (23 & 24 Vict. c. clxxix.) the Hay Railway Company was dissolved, and the tramway undertaking was vested in the Hereford, Hay, and Brecon Railway Company with all the powers and subject to all the liabilities affecting the same at the date of transfer, and the purchasing company were thereby empowered to discontinue the working and user of all or any part of the tramway and the works and conveniences thereof as they might think fit, and (with certain immaterial exceptions) to sell and dispose of 'to such persons for such purposes at such times for such considerations, and on such terms and conditions whatsoever as they might think fit,' the lands and other property of the Hay Company thereby vested in the purchasing company. By s. 32 of the Act the owners of lands adjoining the tramroad were to be entitled, according to the extent of the frontage of their land against the tramroad, to the option of purchasing the tramroad; and this option was to be declared within a limited time after service by the company on the adjoining owner of a notice to treat.

"It was under these conditions and in these circumstances that the use of the tramway was discontinued and the works dismantled. By degrees the holes left in the surface by the removal of the stones on which the rails had been laid were filled up; the whole track became overgrown with grass, and although to those who knew the old tramway the identification of its route alongside the road presented no difficulty, it is clear from the evidence that to some who had no knowledge of the pre-existing state of affairs the old tramway track presented no features distinguishing it from the ordinary grass margin, and that in some places it is not easy to-day to fix the lateral boundary between grass margin and tramway track without careful local examination.

C. A. 1909 — COATS v. HEREFORDSHIRE COUNTY COUNCIL.

"In 1874 the Midland Railway Company acquired, under statutory powers, the undertaking and property of the Hereford, Hay, and Brecon Railway Company, and, as I have already stated, in 1906 they sold to the plaintiff that part of the old tramway track which includes the land in dispute in this action."

The preliminary question of law directed by the Court of Appeal, namely, "whether during the relevant times there could have been dedication of the strip of land," came on for argument on January 28.

Macmorran, K.C., P. O. Lawrence, K.C., and *MacSwinney*, for the plaintiff. The Act of 1811 only gave the public a right to use the tramroad as a tramroad upon payment of tolls. No inference that this tramway was part of the highway can be drawn from the fact that it is within the fences bounding the highway on the one side and the highway plus the tramway on the other side, because the fence by the side of the tramway was erected by the railway company under their statutory obligation.

The Act of 1860 gave the adjoining owner a right of pre-emption in respect of lands discontinued to be used, and in the face of that right the railway company could not dedicate a right of way over those lands or create an incumbrance on them before they made the offer of them to the adjoining owner. They never did offer this land to the plaintiff or his predecessor in title, but they eventually sold it by agreement to the plaintiff. The option of pre-emption subsists until the company have offered the land to the adjoining owner and he has rejected the offer.

The words of the Act are "may from time to time appropriate and use" and "may from time to time discontinue the working of" the railway. So long, therefore, as the company did not dispose of the land for other purposes, it would be inconsistent with the resumption of the user and appropriation if they were to dedicate it to the public, and between 1860 and 1906 their right to resume would have been a good answer to the adjoining owner if he had demanded a notice under the Act.

The company's Act contained provisions similar to those in

the Lands Clauses Consolidation Act, and the decisions under that Act are applicable. The company had no power to dedicate. *Lord Beauchamp* v. *Great Western Ry. Co.* (1) shews that the right of the adjoining owner arises so soon as the company attempt to dispose of the lands in any way, and we submit that the company cannot be presumed to be intending to do that which they have no power to do while the option is subsisting. A corporation holding land upon a public trust cannot create an incumbrance upon it: *Paterson* v. *Provost of St. Andrews.* (2)

Dedication is equivalent to a pro tanto alienation which the railway company had no power to make—*Taff Vale Ry. Co.* v. *Pontypridd Urban Council* (3)—and is incompatible with the special purpose of a railway: *Great Western Ry. Co.* v. *Solihull Rural Council* (4); *Grand Junction Canal Co.* v. *Petty.* (5) *Mulliner* v. *Midland Ry. Co.* (6) was a case of dedication of a right of way across a railway, and not along the whole length of it, as suggested in this case.

Moreover, it does not help the company that the adjoining owner consents to dedication by them, because until he himself has got back the land under his option he has no such estate or interest as would make any consent of his effectual. He has no right to interfere, and acquiescence on his part, just like acquiescence by a remainderman, has no effect, because it is acquiescence in an act which does not affect him. But the company and the adjoining owner, unlike a tenant for life and remainderman, are not such a combination of persons as can together effectually dedicate, and therefore the decision in *Farquhar* v. *Newbury Rural Council* (7) does not in any way affect this case.

Powell, K.C., Jessel, K.C., and *Clayton*, for the defendants. There was no express dedication by grant in this case, but it can be implied from the circumstances. Previous to the acquisition of the land in 1811 there could no doubt have been dedication. Between 1811 and 1865 there was capability

(1) (1868) L. R. 3 Ch. 745, 751.
(2) (1881) 6 App. Cas. 833.
(3) (1905) 3 L. G. R. 1339; 69 J. P. 351.
(4) (1902) 86 L. T. 852; 66 J. P. 772.
(5) (1888) 21 Q. B. D. 273.
(6) (1879) 11 Ch. D. 611.
(7) [1909] 1 Ch. 12.

C. A. 1909 COATS v. HEREFORDSHIRE COUNTY COUNCIL.

of dedication: *Rex* v. *Inhabitants of Leake* (1); *Grand Junction Canal Co.* v. *Petty*. (2) The Act does not contain any prohibition against using the land as a footway, and there is no incompatibility with the purposes of a railway in dedicating it to that extent: *Attorney-General* v. *London and South Western Ry. Co.* (3) In the last-named case and in *Grand Junction Canal Co.* v. *Petty* (2) there was no question raised about the rights of adjoining owners, and those cases and *Midland Ry. Co.* v. *Wright* (4) shew that although a railway company cannot alienate, they may be dispossessed; they can dedicate, though they cannot convey.

With regard to the position after 1865, when the tramway was discontinued, we submit that, however necessary the land may have been at one time for the purposes of the undertaking, it became superfluous land as soon as it ceased to be required for those purposes and vested in the adjoining owner—*Great Western Ry. Co.* v. *May* (5)—and if acquiescence on his part is necessary, then there has been such acquiescence: *Farquhar* v. *Newbury Rural Council.* (6) The acquiescence of some one who had a right to object was regarded as sufficient in *Reg.* v. *Petrie.* (7)

P. O. Lawrence, K.C., in reply.

Eve J. This action involves the question whether a strip of land abutting on a high road leading from Hay in the county of Brecon to the city of Hereford constitutes a part of the high road, or whether the plaintiff, who admittedly is the owner of the soil of the strip, is entitled to enclose it and incorporate it as part of his adjoining land on the ground that there has been no dedication of the surface to highway uses. Issue having been joined, an application was made to me to transfer the action for trial to the King's Bench Division with a view to its being heard at the assizes in Hereford, and the application was put forward and supported on two grounds, namely—(1.) that the locus in quo was situated in Hereford, and it would be

(1) (1833) 5 B. & Ad. 469.
(2) 21 Q. B. D. 273.
(3) (1905) 3 L. G. R. 1327; 21 Times L. R. 220.
(4) [1901] 1 Ch. 738.
(5) (1874) L. R. 7 H. L. 283.
(6) [1909] 1 Ch. 12.
(7) (1855) 4 E. & B. 737.

extremely convenient for the jury, if there were one, and, if there were not a jury, for the judge, to have an opportunity of viewing the strip of land; (2.) that, inasmuch as the question of dedication would fall to be determined by acts of the public, spread over a very considerable period, it would necessitate the calling of a number of local witnesses, many of them advanced in years, and that the expense of calling these witnesses would be much less if the matter were dealt with in Herefordshire than if it were dealt with in London. On the other hand, on behalf of the plaintiff it was urged that the case was not a case falling to be determined simply upon the facts, but that there were involved in the case questions of law, and the questions of law were so intermingled with the questions of fact that the plaintiff was entitled to choose his tribunal, and, having chosen his tribunal, there were no sufficient grounds why the judge to whom the action was attached should send it away to be tried elsewhere. Having heard leading counsel upon these two lines, in the exercise of my discretion, I came to the conclusion that there were in this case questions of law which could not be wholly disentangled from the questions of fact, and that in the circumstances I might be doing the plaintiff an injustice if I were to send the whole case to be tried at the assizes, and I made an order the effect of which was to keep the action for trial in London. Against that order the county council, who are the defendants, appealed, and when the matter came before the Court of Appeal, the most important question of law having been stated to be the question whether or not this particular strip was at any relevant time capable of dedication, the Court of Appeal made an order varying the order which I had made. The Court of Appeal ordered "the question whether during the relevant times there could have been dedication of the strip of land in the pleadings mentioned to be first tried by the judge of the Chancery Division to whom this action is assigned," and further ordered that, "if he holds that there could have been dedication, he is to determine how and where the other respective questions raised in the action respectively be tried, he being unfettered by any order hitherto made or any opinion hitherto expressed." Pursuant to that order the case now comes on for

C. A. 1909

COATS v. HEREFORDSHIRE COUNTY COUNCIL.

Eve J.

the purpose of my determining this question, and this question only—"whether during the relevant times there could have been dedication of the strip of land in the pleadings mentioned."

In order to determine that question it is necessary that I should state the facts upon which I base the conclusion at which I have arrived. In 1811 an Act of Parliament was passed under which the construction of the railway or tramroad which originally lay along this strip of land was authorized, and pursuant to that Act the company acquired from the owners of the land across which the tramroad was to be laid the land necessary for the construction of the tramroad. The tramroad was duly constructed, and from the date when it was constructed until the year 1865 it was utilized for the purpose and in the manner contemplated by the statute of 1811. I shall for the purposes of this judgment assume that the tramway ran through an agricultural district sparsely populated, and that there was no such extensive traffic upon it as would have rendered the presence of a wayfarer on the tramway a circumstance calculated to expose a pedestrian to any undue risk of life or limb. In 1865, the tramway having served its purpose, and other means of locomotion having come into existence, it was no longer as necessary as it had been in the early part of the century, and accordingly the company which had constructed and maintained it was dissolved, and the land and plant which the company owned were transferred to other companies, and one of the two companies which so acquired a portion of the land and plant was the Hereford Company, whose title accrued under a statute passed in the year 1860. The Hereford Company was a railway company as understood in modern parlance, and it was uncertain whether when the old tramroad was discontinued the Hereford Company would or would not require the land upon which the old tramroad had lain for the purpose of the Hereford Company's undertaking, and under the statute which vested in the Hereford Company the land, including the land here in dispute, it was left open to the Hereford Company to make use of the land either continuously or discontinuously and either immediately or at some future time for the purposes of its railway. There was also included in the Act an express power to

the Hereford Company to sell all or any part of the old tramroad land thereby vested in them subject to this restriction, that in the event of their determining to sell all or any part a right of pre-emption was reserved to the owners whose land abutted on or adjoined the land so determined to be sold. The Hereford Company did not in fact use any portion of the strip in question in this action for the purpose of their undertaking, and finally in 1906, pursuant to its power of sale, coupled with the restriction, their successors, the Midland Railway Company, sold the strip to the plaintiff in this action.

That is the history of the strip, and I have, in approaching this question, first of all to consider what is meant by the order when it says "whether during the relevant times there could have been dedication of the strip of land." It seems to me that the relevant times here must be limited to the time subsequent to the Act of 1811.

I think the words "relevant times" in the order point to some reasonable limitation upon the time which is to be taken into consideration in determining the rest of the question, and I cannot bring myself to believe that the time anterior to 1811 is really relevant for the purposes of this action. I think, if there had been rights of the public subsisting by dedication prior to 1811, some reference to the existence of those rights must have been met with in the statute. I hold, therefore, that the relevant times are such times as have elapsed since the passing of the statute of 1811.

Now during the first of those times, that is, from the year 1811 down to the year 1865, could there have been dedication, or could there have been dedication in the period subsequent to 1865, or could there have been dedication in both those periods? I am anxious on this occasion not in any way to prejudice the ultimate decision which may be arrived at on the facts of this case, because it may be that, when the facts come to be thoroughly sifted and heard and proved in Court, the actual time of dedication may be found to be in one of those periods different from the one in which I have to determine whether dedication could have taken place. Therefore, for the moment, I leave open the question whether dedication could have taken place prior to the

C. A. 1909 COATS v. HEREFORDSHIRE COUNTY COUNCIL Eve J

year 1865. It may never be material to determine it, but I am not prepared at this moment to determine either one way or the other whether there could or could not have been dedication during the existence of the tramroad, and, leaving that matter entirely open, the period with which I deal is the period subsequent to 1865. Now subsequent to 1865 the position was this: The Hereford Company held this land with the power at any time to utilize it for the purposes of their undertaking, and so long as they did no act which conclusively prevented them from exercising that power it seems to me that they were in the position to allow the land to be dedicated to the use of the public if they were so minded, and that they were not prevented from so doing because, if and when they decided that the land was not necessary for the purpose of their undertaking, and therefore was to be sold, their power of sale was restricted by their obligation to give to the adjoining owner a right of pre-emption. That being so, I think that there was during the period from 1865 onwards a possibility of the land being dedicated, and therefore that during a relevant time there could have been dedication of the strip of land. That really is quite sufficient by way of answer to the question propounded by the order of the Court of Appeal, and in those circumstances I must answer the question by saying that there could during a portion of the relevant times have been a dedication of the strip of land in the pleadings mentioned.

[His Lordship then considered the question whether the action should be tried before him or be sent to the assizes, and he decided to retain it.]

April 20. The action now came on for trial with witnesses upon the question whether there had in fact been a dedication. The result of the evidence is stated in his Lordship's judgment.

Macmorran, K.C., P. O. Lawrence, K.C., and *MacSwinney*, for the plaintiff. The question is whether this enclosed piece of land is part of the road itself or whether there has been an unlawful encroachment upon the road. First, there could not be any dedication of the land in question before 1811, and while the Act of 1811 was in force there could be no dedication.

Secondly, looking at the relative heights of the tramway and the road, it was quite impossible that there could have been vehicular traffic upon this part of the tram line. Thirdly, there is no presumption to be raised as to land lying between fences on either side of a road being considered as part of a highway, unless such fences were intended to be the fences of the highway: *Offin* v. *Rochford Rural Council* (1); *Attorney-General* v. *Moorsom Roberts.* (2)

It follows that the defendants must shew that there has been dedication of this land to the public by some acts of user. It is admitted that there has been no express dedication, and the only way in which it can be set up is by reason of user since 1865. By that date the old tramway had been dismantled, and to a large extent the tram line was incapable of being used even by foot passengers. There must be an intention to dedicate, and user is the only evidence of such intention: *Holloway* v. *Egham Urban Council.* (3)

In the present case the evidence shews that there were agreements by the old company for letting part of the tram line, and inclosures of part of it were made, and sales of other parts, all which acts were inconsistent with an intention to dedicate to the public. One single act of interruption is of more weight than many acts of acquiescence: *Poole* v. *Huskinson.* (4)

Further, having regard to the previous Acts of Parliament and the way in which the tram line has been dealt with, it is in the highest degree improbable that there could have been any intention to dedicate. Moreover, there could have been no dedication because there were no adjoining owners capable of exercising their rights of pre-emption, inasmuch as the adjoining lands were in mortgage.

Powell, K.C., Jessel, K.C., and *Clayton,* for the defendants. The Court decided on the former occasion that there was possibility of dedication. It is not open to the plaintiff now to raise the contention that the mortgages on the property were a bar to dedication. There is no case that so decides.

(1) [1906] 1 Ch. 342.
(2) (1908) 6 L. G. R. 470; 72 J. P. 123.
(3) (1908) 6 L. G. R. 929; 72 J. P. 433.
(4) (1843) 11 M. & W. 827.

C. A. 1909

COATS v. HEREFORDSHIRE COUNTY COUNCIL.

[EVE J. On the evidence it is quite clear that the mortgagors were in possession throughout.]

We submit that this is a highway because of the long and continuous public user which has been proved. Dedication will be presumed where an owner leaves his land open to the public and the public use it: *Spedding* v. *Fitzpatrick* (1); *British Museum Trustees* v. *Finnis* (2); *Rugby Charity Trustees* v. *Merryweather* (3); *Greenwich Board of Works* v. *Maudslay* (4); *Rex* v. *Lloyd* (5); *Farquhar* v. *Newbury Rural Council.* (6)

The burden of shewing that there was no person who could dedicate lies on the landowner. He has to rebut the presumption of dedication arising from acts of user. Dedication will be presumed if during only a fraction of the period of user there is an owner under no disability. To rebut the presumption the disability must be continuous. From 1902 to 1906 there was an absolute owner of the property, and since the plaintiff acquired his land he has done nothing, until the erection of the fences, to prevent the public from acquiring a right. There is no decision to the effect that the existence of an adjoining owner with his right of pre-emption would prevent dedication. When once there is an owner of land capable of dedicating, then, if there is public user as well, from that moment the Court will presume dedication—*Reg.* v. *Petrie* (7); *Powers* v. *Bathurst* (8); *Farquhar* v. *Newbury Rural Council* (6)—and notwithstanding that the land is let to tenants: *Rex* v. *Barr* (9), followed in *Davies* v. *Stephens.* (10) Those cases shew that the acquiescence by an absent owner to the acts of user may amount to a dedication.

In both *Holloway* v. *Egham Urban Council* (11) and *Attorney-General* v. *Moorsom Roberts* (12) there were very special circumstances.

Such acts of ownership by the railway company as have been proved in this case are referable to the ownership of the soil and

(1) (1888) 38 Ch. D. 410.
(2) (1833) 5 C. & P. 460.
(3) (1790) 11 East, 376, n.
(4) (1870) L. R. 5 Q. B. 397.
(5) (1808) 1 Camp. 260.
(6) [1909] 1 Ch. 12.
(7) 4 E. & B. 737.
(8) (1880) 49 L. J. (Ch.) 294.
(9) (1814) 4 Camp. 16.
(10) (1836) 7 C. & P. 570.
(11) 6 L. G. R. 929; 72 J. P. 433.
(12) 6 L. G. R. 470; 72 J. P. 123.

are not inconsistent with the existence of a right of way over the surface. The plaintiff has not proved one single act of interference with the user.

[EVE J. referred to *Countess of Belmore* v. *Kent County Council* (1) as tending to shew that the taking of herbage might be inconsistent with dedication.]

We submit that the letting of the herbage at a yearly rent was not inconsistent with the right of the public to travel over the surface. There may be limited dedication subject to any obstruction on the highway: *Le Neve* v. *Mile End Old Town Vestry.* (2) The spikes on the plaintiff's fence constituted a common law nuisance—*Fenna* v. *Clare & Co.* (3); *Hadley* v. *Taylor* (4); *Hardcastle* v. *South Yorkshire Railway and River Dun Co.* (5)—and the defendants had a right to remove the fence: *Lemmon* v. *Webb* (6); *Harris* v. *Northamptonshire County Council* (7); *Bagshaw* v. *Buxton Local Board of Health* (8); *Turner* v. *Ringwood Highway Board.* (9)

Macmorran, K.C., in reply. This is not a case of the dedication of an ordinary physically defined highway as in *Spedding* v. *Fitzpatrick* (10), *British Museum Trustees* v. *Finnis* (11), and *Rugby Charity Trustees* v. *Merryweather* (12), nor is it a case to which the doctrines of roadside waste apply. This is an exceptional case of a strip of land adjoining a highway originally forming no part of it, but an independent construction now alleged to be part of the highway by reason of public user. There is a differentiation between what took place down to 1865 and after. By the Act of 1811 riding and driving cattle were prohibited under a penalty, and yet the defendants contend that there has been such user by the public for riding and driving as will make this a public highway. A highway cannot be claimed by reason of acts of user by the public which are expressly prohibited. Down to 1865, therefore, there can be no question of lawful user.

(1) [1901] 1 Ch. 873.
(2) (1858) 8 E. & B. 1054.
(3) [1895] 1 Q. B. 199.
(4) (1865) L. R. 1 C. P. 53.
(5) (1859) 4 H. & N. 67.
(6) [1895] A. C. 1.
(7) (1897) 61 J. P. 599.
(8) (1875) 1 Ch. D. 220.
(9) (1870) L. R. 9 Eq. 418.
(10) 38 Ch. D. 410.
(11) 5 C. & P. 460.
(12) 11 East, 376, n.

C. A. 1909 — COATS v. HEREFORDSHIRE COUNTY COUNCIL.

In *Chinnock* v. *Hartley Wintney Rural Council* (1) Cozens-Hardy J. pointed out that the doctrine of presumption of dedication from public user must be applied with great care in the case of an absentee owner, and his observations apply with even greater force to the present case. Land alongside the road but not part of the highway may be enclosed: *Easton* v. *Richmond Highway Board* (2); and in *Neeld* v. *Hendon Urban Council* (3), where the fence had not been erected in relation to the highway, as is the case here, Channell J. said that the presumption of highway between the fences did not apply.

To establish public user of a right of way there must be usage as a right of passage, and not merely for straying—*Robinson* v. *Cowpen Local Board* (4); *Maddock* v. *Wallasey Local Board* (5)—and I submit that the plaintiff has not proved such user. It does not follow that, because this strip of land is by the side of an old main road, therefore it is in any sense a part of that road or dedicated to the public: *Friern Barnet Urban Council* v. *Richardson.* (6)

Cur. adv. vult.

May 19. EVE J. stated the facts as above set out, and continued:—The oral testimony which has been given at the hearing covers a period approximating fifty years from the present time. A large number of witnesses speak from knowledge, going back to 1860 and 1861, and in some cases to dates more remote. The evidence of one and all is to the same effect, that as long as they can remember the tramway track it has been used, where it adjoins the road, by themselves and other members of the public for all highway purposes, except that of driving carts and vehicles; that this has been done openly and continuously, without let or hindrance, interference or remonstrance; and that, so far as their observation and information go, no distinction has ever been made in user between the tramway track and the grass margin lying by the side of the metalled

(1) (1899) 63 J. P. 327.
(2) (1871) L. R. 7 Q. B. 69.
(3) (1899) 81 L. T. 405.
(4) (1893) 63 L. J. (Q.B.) 235.
(5) (1886) 55 L. J. (Q.B.) 267.
(6) (1898) 62 J. P. 547.

road. Further, it is established by the evidence that since the discontinuance of the tramway in 1865, whenever and wherever it has been convenient to utilize the track adjoining the road for the storage and breaking of stones for repair of the highway, or to dig grips or ditches across or, in one case near Whitney Bridge, alongside it, for draining surface water from the metalled road, the highway authority for the time being has always so dealt with it, and that no protest or attempt to stop them has ever been made.

The absence of interference either with the public or the highway authority is the more significant in that from 1875 to 1890 William Tantrum, a permanent way inspector in the employ of the Midland Railway Company, and living in the immediate neighbourhood, was instructed to, and did in fact, "walk the old tramway three or four times each year to keep possession of it"; and although he interfered to prevent trespasses where the track ran through private lands, he does not suggest that he ever did anything to curtail or control the public user of the track where it adjoined a high road.

In an ordinary case, assuming the existence of a person or body capable of making a dedication, the Court would infer from the foregoing circumstances and facts that dedication had in fact been made. It is therefore necessary to consider the elements present in this case which it is urged are sufficient to rebut the inference. They fall into two categories, the one involving questions whether the land in dispute was capable of dedication, and, if so, whether there was ever in existence any person or body, or any combination of persons or bodies, capable of dedicating, and the other relating to events and conduct alleged to be inconsistent with there ever having been any dedication.

The question whether the land was capable of dedication was decided by me in the affirmative when the question of law propounded by the Court of Appeal was argued in January last. It is not necessary for me to repeat what I then said, but, putting it shortly, I expressed the opinion that at least during the forty years between 1865 and 1906, when the Hereford Company and their successors, the Midland Railway Company, were owners of

C. A. 1909 COATS v. HEREFORDSHIRE COUNTY COUNCIL. Eve J.

the land, with the power at any time to sell it or to use it for the purposes of their undertaking, they were in a position to dedicate, and were not incapacitated from so doing by the right of pre-emption vested in the adjoining owners, if and when they elected to exercise the power of sale.

To that opinion I adhere, and I think it is wholly beside the question to embark upon an inquiry whether, by reason of mortgages or settlements affecting the title to the adjoining land, there was or was not an adjoining owner capable of exercising his right of pre-emption. So long as the companies retained the land, their right to deal with it was not in any way fettered by the statutory obligation to give a right of pre-emption, which right only arose when they had no further intention of retaining the land.

I think, therefore, the land was capable of dedication, and that there was a body capable of making a dedication, and, to avoid misunderstanding, I may perhaps add that in limiting this state of things to the period subsequent to 1865 I must not be considered as deciding that it could not and did not exist also prior to that year. As a matter of fact I think it did. I ought also to add that, even if the Court had to presume a combined dedication by the company in possession and the adjoining owner with his inchoate right of pre-emption, I think in this case there was a period of time in the early seventies, some five years in duration, when there was in fact an adjoining owner capable of joining with the company in making a valid and complete dedication.

It remains to consider the facts upon which the plaintiff relies as negativing the presumption of dedication. They relate in part to land not in dispute in this action. It has been proved that, at each end of the strip in dispute, strips of land part of the old tramroad adjoining the high road (and at the west end it is a strip of considerable length) have within the last twelve or fifteen years been enclosed by adjoining owners and fenced off from the highway. There is some evidence that these inclosures were made with the actual consent of the defendants or the highway authority for the time being. I am not satisfied that this has been proved, but it has been established that the defendants knew of the larger enclosing in 1896, and have since

taken no steps to have that fence, or the one enclosing the lesser area at the east end, removed.

Mr. Powell, on behalf of the defendants, objected to the admission of evidence with respect to these inclosures, and, although I admitted the evidence, I think that his objection was a good one, and that I cannot properly treat it as relevant to an inquiry whether other land, although part of a continuous strip and of a similar description to that to which the evidence relates, has been dedicated to highway purposes. Even in the case of a continuous strip of precisely similar character throughout there may be circumstances of public necessity or convenience arising from an awkward turn or contraction of the high road, or even from particular traffic,—such, for example, as might occur in the vicinity of a railway station,—which would be calculated to induce the inference of dedication more readily in some parts of such a strip than in others; and I think that, even if it is admissible, little weight ought to be attached to evidence which relates to land outside the subject of dispute and of which the owners are no parties to the litigation.

Turning now to the strip in dispute, it is necessary to distinguish the whole strip which is dealt with in the action from the more restricted extent which is the subject-matter of the counter-claim. The difference between the two is represented by that portion of the strip which lies within so much of the plaintiff's fence as the defendants have left standing. In dealing with the evidence of public user I have been careful to confine my conclusions in terms to so much of the tramroad track as adjoins the public high road, and for this reason, that it has been clearly established that, at the spot where the tramway track left the high road and passed behind the two garden inclosures shewn by the colours brown and mauve on sheet No. 4 of Mr. Gunter's book plan, the public passed off the tramroad on to the high road, and did not again pass on to the tramroad until it and the high road again ran side by side. There is, therefore, no evidence from which any dedication to public user of the tramroad behind these two inclosures can be inferred.

So far as the remainder of the strip is concerned—that is to say, the whole of the strip included in the action, except the

C. A. 1909

COATS v. HEREFORDSHIRE COUNTY COUNCIL.

Eve J.

piece I have just dealt with—the plaintiff relies on the following acts of ownership as inconsistent with and rebutting any intention to dedicate:—

(1.) In 1879 Mr. Thomas Dew, the owner of land adjoining the tramroad, commenced the erection of a fence near Whitney Bridge intended to enclose the tramroad. This fence, if completed, would have followed very much the line of the fence erected by the plaintiff and removed by the defendants, but it was nearer the metalled part of the road. As soon as the Midland Railway Company were informed of the work in progress they immediately had it stopped, and shortly afterwards, under their directions, the fence was altogether removed.

(2.) In 1882, by an agreement in writing, the counterpart of which is before me, the Midland Railway Company let to the same Mr. Dew a piece of land twenty feet by ten feet, part of the tramroad, for the erection of a parish pound. The tenancy was a yearly one, the annual rent reserved being 2*s.* 6*d.*, and such tenancy was subsisting and the rent paid by Mr. Dew and his successors each year down to 1906.

(3.) In the early eighties the late husband of the witness Mrs. Caroline Lewis—then Mrs. Caroline Williams—was in occupation of a cottage and land known as Cuckoo's Nest. The fences of the land in his occupation being in disrepair, his cattle from time to time got out on to the tramroad, and the railway company insisted upon his paying 10*s.* a year for feeding his cattle on the track.

(4.) On September 24, 1884, by an agreement in writing which has been put in evidence, the railway company let to the same Mr. Williams "all that piece of land or old tramway situate at Whitney, in the county of Hereford, as shewn by red colour on the tracing attached, with privilege to erect a fence, and late in the occupation of William Evans," on a half-yearly tenancy at a half-yearly rent of 5*s.* This tenancy appears to have continued for some years, and from 1893 to 1897 the land was again let, by the same description and for the same rent, to Thomas Wilding, a stepson of Williams. The land comprised in this tenancy includes the greater portion of the land excepted from the counter-claim.

(5.) In 1886 David Thomas Prosser, a farmer in Clifford, was removing some of the ballast from the centre of the old track for use in connection with some work at his farm. The fact having come to the notice of the railway company, they gave him notice that he was trespassing and called upon him not to remove any more, and he thereupon desisted.

(6.) There is some slight evidence that some persons who cut and carried grass from the track did so with permission from the railway company.

In appreciating the true effect to be given to the acts and matters just enumerated it is to be observed that they are referable to the company's ownership of the soil rather than to any intention to exclude the passage of the public, and with one exception—the establishment of the pound—none of them were calculated to interfere with the use which the public had then already been making of the tramroad for very many years. Indeed in two, if not in three, of the instances the action taken was in the direction of facilitating, rather than hindering, such use. I allude to the removal of Mr. Dew's fence, to the retention of the ballast in the centre of the track, and to the cutting and removal of the grass.

Neither Williams nor Wilding availed himself of "the privilege to erect a fence" given to each of them in his agreement, if that phrase is to be understood as having reference to a fence which would enclose the land from the road; and of the earlier arrangement between Williams and the company, under which the 10s. per annum was paid, there is no written record, nor any evidence of it beyond Mrs. Lewis's recollection. She may have confused it with the letting under the written agreement of which she apparently had no recollection, but even if it was an earlier and separate agreement it in no way stopped or impeded the public in passing over the strip on which the cattle fed.

And indeed this last observation leads me to what constitutes the pregnant rejoinder to the whole case upon which the plaintiff relies, and it is this, that the conduct of the owners of the soil, in asserting again and again that ownership, emphasizes the attitude of acquiescence with which they uniformly accepted the

C. A. 1909 COATS v. HEREFORDSHIRE COUNTY COUNCIL. Eve J.

continuous user of the surface by the public for highway purposes. When one finds an owner alive to the necessity of evidencing his continued possession by periodical perambulations, active to prevent any encroachment upon or interference with his soil, and warning off trespassing wayfarers from part of his land, and at the same time permitting, without protest or interference of any kind, the unrestricted passage of the public over the surface of the very soil of which he is asserting his ownership, and over parts of his land which differ only from the parts where trespassing is prohibited by their being adjacent to the high road, I think that there are cogent grounds for attributing to the public use an origin which, as against the owner of the soil, has established public rights.

In the present case, upon a review of the whole of the evidence, I think I am bound to infer a dedication at some time anterior to 1879, and to treat the acts of the railway company as acts of ownership exercised subject to the rights conferred by that dedication, or, so far as they were inconsistent with or in derogation of public rights, as being of a nature inflicting too insignificant an injury to call for active interposition on the part of those responsible for the preservation of the rights. Of such a nature was, in my opinion, the erection of the pound.

The result is that I cannot hold the plaintiff to be entitled to any of the relief he claims by paragraphs 1, 3, 4, and 5 of his claim, and the declaration under paragraph 2 thereof must be limited to so much of the strip as lies behind or to the south of the land coloured brown and mauve on sheet 4 of Mr. Gunter's book plan. Subject to this limited declaration, I must dismiss the action, and as concerns the costs of the action I think that, having regard to the fact that the defendants by their defence raised the issue that the whole strip acquired from the railway company by the plaintiff is a public highway, and was such when the old Hay tramway was laid thereon, and that in the face of the plaintiff's offer contained in his letter of May 23, 1907, the case of the fence being a nuisance to the public was persisted in, I ought not to visit the plaintiff with all the costs. I accordingly order him to pay five-sixths of the defendants' costs.

On the counter-claim the defendants are entitled to a declaration in the form of the first of the two alternatives claimed by paragraph 1; to the injunction as claimed in paragraph 2, omitting the words "or a nuisance"; to 4*l.* 1*s.* damages; and to the costs of the counter-claim.

R. M.

C. A.
1909
COATS
v.
HEREFORDSHIRE COUNTY COUNCIL.

C. A.

Nov. 3, 4. The plaintiff appealed, but at the hearing he abandoned the whole of the appeal except in so far as he objected that the declaration at the commencement of the order (apparently by inadvertence) did not extend to the whole of that part of the land fenced off by the plaintiff, his right to fence which the defendants had not disputed at the trial. By consent the order was varied by omitting the declaration and prefacing the dismissal of the action by a statement that the defendants did not claim and never had claimed any rights in respect of that part of the land, the right to fence which was not in dispute; and subject thereto the appeal was dismissed with costs.

Solicitors: *Seagrove, Woods & Mitchell, for Cheese & Armstrong, Hay, Hereford; Crowders, Vizard, Oldham & Co., for J. R. Symonds, Hereford (Corner & Co., Hereford).*

H. B. H.

C. A.
1909
Oct. 18.

SALAMAN *v.* HOLFORD.

[1909 S. 620.]

Landlord and Tenant—Lease at a Rack Rent—Lessor's Covenant to pay all present and future Rates and Taxes—Sub-letting at a Profit—Increased Assessment—Liability of Lessor.

Where, in a lease of premises at a rack rent, the lessor covenanted to pay all rates and taxes "now payable or hereafter to become payable in respect of the premises":—

Held, that the lessor's liability under his covenant was not limited to the assessment existing at the date of the lease, but extended to an increased assessment.

Watson v. *Home*, (1827) 7 B. & C. 285; *Smith* v. *Humble*, (1854) 15 C. B. 321; and *Mansfield* v. *Relf*, [1908] 1 K. B. 71, discussed and distinguished.

Decision of Neville J., p. 64, ante, affirmed.

Appeal from a decision of Neville J. (1) which raised the question of the liability of a lessor, who had covenanted to pay all rates and taxes now or hereafter to become payable in respect of the demised premises, to pay the increased rates imposed by a fresh assessment.

The documents and facts are given in greater detail in the report of the case in the Court below, and the following summary is considered sufficient for the purposes of this report.

By a lease of August 2, 1899, the first, second, third, and fourth floors of Nos. 10 and 10A, New Bond Street were demised to the lessee for twenty-one years from Michaelmas, 1899, at the yearly rent of 300*l*., clear of all deductions, payable quarterly on the usual quarter days; and the lessee covenanted (amongst other things) to pay "the inhabited house duty payable in respect of the whole of the said premises Nos. 10 and 10A, New Bond Street"; not to make any alteration or addition whatsoever in or to the demised premises without the written consent of the lessor; and not to assign or underlet without the previous licence in writing of the lessor. The lessor covenanted that he would during the said term "pay all rates taxes duties and outgoings (including water rate) now payable or hereafter to

(1) Ante, p. 64.

become payable in respect of the said premises except inhabited house duty as hereinbefore provided."

At the date of the lease the basement and ground floor of the premises were let to other parties, and no part of the premises was separately assessed to rates and taxes, but were assessed as a whole at 550*l.* net rateable value, the proportion attributable to the four floors contained in the lease of 1899 being 194*l.*

Between August, 1901, and March, 1905, the lessee, with the sanction of the lessor, sub-let the various floors at rents which gave him a profit rental, the total rents derived from these sub-leases amounting to 510*l.*

Under the quinquennial revaluation of the premises in July, 1905, each of the floors demised by the lease of 1899, as well as the ground floor and basement, was separately assessed to rates and taxes at sums amounting in the aggregate to 732*l.*; the proportion attributable to the four floors contained in the lease of 1899 was 293*l.*, being 99*l.* in excess of the 194*l.* at which those premises were assessed at the date of the said lease.

The increase in the assessment was alleged by the lessor to have been mainly due to the fact that the lessee had sub-let the floors at profit rentals.

A summons having been taken out to determine the question whether the lessor's covenant made him liable to pay the whole of the increased rates and taxes, Neville J. decided that the lessor's liability extended to the increased assessment.

The lessor appealed.

Peterson, K.C., and *Foà*, for the appellant. The authorities shew that a covenant of this kind must be construed reasonably so that each party should pay according to the benefit received. In *Watson* v. *Home* (1), where the covenant was in terms absolute, it was held that the landlord was liable to pay the taxes in proportion to the rent reserved and not to the improved value, and in that case Holroyd J. lays it down that each party should contribute to the taxes in proportion to the benefit which he receives from the land; the lessor will pay taxes upon the original value and the tenant upon the improved value, of which he alone reaps

(1) 7 B. & C. 285.

C. A. 1909 SALAMAN v. HOLFORD.

the benefit. *Smith* v. *Humble* (1) followed *Watson* v. *Home* (2), and both cases were followed and approved in *Mansfield* v. *Relf* (3), where the covenant was construed as referring only to so much of the land tax chargeable as was proportionate to the benefit derived therefrom by the lessors.

The present is a stronger case, because in the cited cases improvements were contemplated; but here the lease is at a rack rent and improvements are not contemplated. The incidence of taxes where the tenant agrees to pay them is dealt with in *Hyde* v. *Hill* (4), *Whitfield* v. *Brandwood* (5), and *Yeo* v. *Leman*. (6)

The tenant here gets an advantage by sub-letting at a profit which increases the assessment, and for this the lessor ought not to be made liable.

Butcher, *K.C.*, and the *Hon. M. Macnaghten*, for the lessee, were not called upon.

COZENS-HARDY M.R., after stating the nature of the appeal and the material portions of the lease of August, 1899, continued:— There has been no change whatever in the physical condition of the premises, but at the quinquennial valuation in July, 1905, the assessment was considerably raised. I gather that there was evidence that property in New Bond Street has been rising in value, and that the defendant, who obtained this lease of these four floors, has been able to let them to other tenants at a considerable advance in rent. The assessment authorities at the quinquennial valuation, looking, as they were entitled to do, at Sched. A of the Income Tax Act in the returns of the rent, treated that as some evidence of the value, and they raised the assessment, and we are seriously asked to hold that, though there has not been a particle of change in the structure of that which was demised, the mere circumstance that the assessable value has been raised by the lawful authority alters the plain meaning of this covenant and entitles the landlord to say "I am only bound to pay the rates and taxes in the proportion which the assessable value at the date of the lease bears to the present assessable

(1) 15 C. B. 321.
(2) 7 B. & C. 285.
(3) [1908] 1 K. B. 71.
(4) (1789) 3 T. R. 377.
(5) (1818) 2 Stark. 440.
(6) (1743) 2 Str. 1191.

value." I entirely decline to adopt that view. It seems to me it is quite hopeless, and I do not think that but for certain authorities, which have very little to do with the point before us, counsel would have had the courage to argue the present case.

It has, however, been said there is a chain of authority, going back to *Watson* v. *Home* (1) in 1827 and extending down to *Mansfield* v. *Relf* (2) last year, which binds us in this case and compels us to adopt the appellant's argument. When the authorities are looked at they really do nothing of the kind. The leading case of *Watson* v. *Home* (1) is a case in which upon the construction of the covenant in the lease itself the Court held that all the landlord had covenanted to pay rates in respect of was on the ground demised, and that the fact that the ground had, with the approval of the landlord, been subsequently covered with flats and houses changed the subject-matter of the assessment—in fact the Court held that the reasonable view was that all the landlord intended to covenant to pay rates in respect of was that which alone was expressly demised, namely, the ground. In that case the Court treated the rent reserved by the landlord as evidence of the value of the ground which was demised: in so far as any principle is involved in that case, that is what was decided. Then *Smith* v. *Humble* (3) was a land tax case, and with regard to land tax it was perfectly clear from the language of the Land Tax Act itself that the tenant was to pay the tax and deduct out of the rent so much of the rate as in respect of the said rent the landlord should and ought to pay and bear, and the Court held, as the lessor covenanted that he would pay the land tax, that it meant he would pay and bear so much of the land tax as was properly attributable to him, not pay and bear so much of the land tax as was attributable to the greatly increased value which the lessee had put upon the premises by reason of building with the consent of the ground landlord.

Then I come to *Mansfield* v. *Relf*. (2) That again was a land tax case following precisely on the lines of *Watson* v. *Home* (1), and although there are some observations of Vaughan Williams

(1) 7 B. & C. 285.
(2) [1908] 1 K. B. 71.
(3) 15 C. B. 321.

C. A. 1909. SALAMAN v. HOLFORD. Cozens-Hardy M.R.

L.J., basing his decision on the analogy of *Watson* v. *Home* (1) and *Smith* v. *Humble* (2), which were relied on by the appellant, still these observations were in no way necessary to the decision of the case, and, with the utmost respect, ought not to be treated as governing the present case.

I think the decision of the learned judge in the Court below was perfectly right, and the appeal must be dismissed with costs.

FLETCHER MOULTON L.J. I am of the same opinion.

We have here to construe a covenant in a lease whereby the lessor covenants with the lessee that he will during the term "pay all rates taxes debts and outgoings (including water rate) now payable or hereafter to become payable in respect of the said premises." In my opinion there is no ambiguity whatever in the language of that covenant. The parties knew perfectly well that the assessments on which rates are collected are made periodically, and that during the term of the lease those assessments would probably vary from time to time, because it is well known that property in towns is subject to great changes in value. It therefore must have been in the contemplation of the parties that these rates would vary by reason of variations in these periodical valuations. When the lessor covenants that during the term he will pay all the rates hereafter to become payable in respect of the premises he means he will pay the actual rates which are charged in the various years on those premises, and which are, as I have said, based on these periodical valuations. There is, therefore, no ambiguity in the covenant, and I decline to put any strained interpretation upon it, or to depart from the simple meaning of the language.

But I am told I am compelled to do so by a long series of authorities. On examining the so-called long series of authorities I find that they do not in any way justify us in departing from the simple meaning of this covenant. These authorities only shew that in cases where the Court believes that the change in the assessment is due to alterations in the premises, and there is room in the language of the covenant for the Court to come to the conclusion that the rates that were referred to in it meant

(1) 7 B. & C. 285. (2) 15 C. B. 321.

the rates on the undeveloped premises, the Court will lean towards that interpretation. In this case there are no alterations, so that no one of those cases applies at all. When one examines the facts leading to these decisions it may well be that in the cases before them the Courts decided rightly. But I cannot think that the language used in some of the judgments is happy, or that it properly expresses the ratio decidendi on which the Court should go. I do not think that the question as to whether persons bear more or less of the burden—whether they are in the favourable position of receiving revenue without bearing their share of burden—ought to influence us in construing a clear covenant. But I can quite understand that it may, in a case where there are two possible meanings, lead the Court to suppose that the parties meant the one thing or meant the other, though it cannot have any influence on the construction where the words are clear, as they are in the present case.

FARWELL L.J. I am of the same opinion. This is merely a question of construction of a particular lease, and if it were not for the authorities the case, in my opinion, would be too plain for argument. But there are unfortunate references in cases which have been decided on the construction of other documents which lend colour to the suggestion that there is a general principle applicable to all cases, which I think is quite unfounded. There are two classes of cases to which we have been referred—one the land tax cases, which depend upon the statute and really have no bearing whatever on the present case, and the other cases, of which *Watson* v. *Home* (1) is the best, in which on a question of construction the Court found itself enabled to construe the particular document before it, where the tenant has himself been the cause of the great increase in the rates by alterations and improvements made by himself. Those are cases which turn, with all respect to some of the judges who have said otherwise, on the construction of the particular document in each case, and I, with great respect, deny that there is any general rule of construction which can be applied to all leases, as has been argued before us, by reason of the decision

(1) 7 B. & C. 285.

C. A. 1909

SALAMAN v. HOLFORD.

Farwell L.J.

of certain judges on particular covenants. Bayley J. in *Watson* v. *Home* (1) protected himself from being so misunderstood by saying that the question turned entirely on the construction of the clause in the lease, and Holroyd J. in the same case (2) says that it seemed to him to be the effect of the covenant in that case, but neither one of them purported to lay down any general principle by which the Court is justified in construing the plain words of a covenant so as to extend them to something to which they have no application.

In this case nothing has been done by the tenant except to sub-let, which he was entitled to do; he has sub-let, as obviously it was anticipated he would, and that has been taken as evidence by the assessment committee on which the assessment has been raised; but it is inconceivable that the landlord or tenant in this case could have expected the assessment to continue unaltered, and because the landlord would have got the benefit of it when it went down is no reason for saying that the tenant is to bear the burden if it goes up. There may be an alteration in the assessment, moreover, which, by raising the assessment, would not increase the actual burden on the premises, because if it was raised all round and the whole plot or the whole premises were raised together, the rate being lower, the amount payable would remain the same. There is no rule of law which compels us to say that the tenant has to bear the burden and not the landlord. I think Neville J. was right, and the appeal must be dismissed with costs.

Solicitors: *Emanuel, Round & Nathan; Harper, Battcock & Co.*

(1) 7 B. & C. 289. (2) 7 B. & C. 292.

W. C. D.

In re BENTLEY'S YORKSHIRE BREWERIES, LIMITED.

WARRINGTON J.

1909

July 16, 17.

[1909 B. 1822.]

Brewery Company—Debenture Trust Deed—Mortgaged Licensed Premises—Security not yet enforceable—Trustees' Powers—Power to sell and convert—Investment of Proceeds of Sale—Non-renewal of Licences—Licensing Act, 1904 (4 *Edw.* 7, *c.* 23), *s.* 2—*Compensation—Capital Moneys—Purchase-moneys—Applicable as Proceeds of Voluntary Sale—Purchase of or Investment on Mortgage of Licensed Premises of Company.*

Where a brewery company has executed a trust deed to secure debentures with the usual clause providing that the trustees shall on the company's application sell or concur in selling any part of the mortgaged premises and hold the proceeds on trust for reinvestment, and the licences of part of the mortgaged premises have been taken away under the Licensing Act, 1904, such a proceeding is a sale and the compensation moneys awarded under the Act are "purchase-moneys" or "capital moneys" within the meaning of the trust deed.

The trustees in such a case, if possessed of the requisite powers, may invest the "purchase" or "capital moneys" in the purchase or on mortgage of licensed properties, and, if so advised, in the purchase or on mortgage of licensed premises of the company.

Dawson v. *Braime's Tadcaster Breweries, Ld.*, [1907] 2 Ch. 359, followed.

ADJOURNED SUMMONSES.

On March 3, 1880, Henry Bentley & Co., Limited, a brewery company, was incorporated under the Companies Acts, 1862 to 1879.

By a debenture trust deed dated December 7, 1889, the company conveyed and assured certain freehold, copyhold, and leasehold hereditaments to trustees upon trusts to secure an issue of 150,000*l.* debentures. Clause 11 of the deed (so far as material) provided as follows: "At any time before the trustees or trustee shall have made such entry as aforesaid the trustees or trustee shall upon the application and at the cost of the company sell or concur in selling any part or parts of the mortgaged premises in the same manner as they or he could do if the primary trust for conversion had then arisen and shall hold the proceeds of any such sale upon trust to lay out the whole or any part thereof in such one or other of the following ways as may be agreed

WARRINGTON J.

1909

BENTLEY'S YORKSHIRE BREWERIES, LIMITED, *In re.*

upon between them or him and the company or its assigns that is to say either in the redemption of any of the debentures then outstanding if the time for redemption shall have arrived or in the purchase of any freehold copyhold or customary lands tenements and hereditaments for an estate of fee simple in possession free from incumbrances or of any leasehold messuages lands tenements or hereditaments for any term of years whereof not less than eighty years shall be unexpired at the time of such purchase and to be held in connection with the other property for the time being subject to the trusts of these presents and be conveyed or assured in such manner as the trustees or trustee shall require so as to become subject to all the trusts powers and provisions herein contained And until any such investment as aforesaid the trustees or trustee shall invest the said proceeds in any manner in which trustees are by law authorised to invest moneys in their hands with power from time to time to vary such investments and with power (until the primary trust for conversion shall arise) to resort to any such last-mentioned investments for the purpose of redeeming any of the said debentures or purchasing any such lands tenements and hereditaments as aforesaid . . . ."

The debentures issued under this deed contained a floating charge on the undertaking and all the property of the company.

In 1892, while the debentures for 150,000*l.* were still outstanding, Henry Bentley & Co., Limited, amalgamated with several other brewery companies under the name of Henry Bentley & Co. and the Yorkshire Breweries, Limited, and the new company so constituted assumed the liabilities of Henry Bentley & Co., Limited.

In 1893 the new company, with the sanction of the Board of Trade, changed its name to Bentley's Yorkshire Breweries, Limited.

By a debenture trust deed dated August 31, 1893, the company conveyed and assured other freehold, copyhold, and leasehold hereditaments to trustees upon trusts to secure a further issue of 200,000*l.* debentures. The deed was for all practical purposes identical with the deed of 1889, with the single exception that the provisions as to the sale of the mortgaged premises and the

investment of the proceeds were contained in clause 12 instead of in clause 11.

The debentures issued under this deed also contained a floating charge on the undertaking and all the property of the company.

By a debenture stock deed dated December 10, 1897, Bentley's Yorkshire Breweries, Limited, conveyed and assured the freehold, copyhold, and leasehold hereditaments described in the first six schedules thereto (subject as to the hereditaments described in the third schedule to the trust deed of 1889 and as to those described in the fourth schedule to the trust deed of 1893) upon trusts to secure an issue of 650,000*l.* 4 per cent. irredeemable mortgage debenture stock. By clause 10 the company charged in favour of the trustees its other assets for the time being, both present and future, including its uncalled capital (subject nevertheless to the charges subsisting in favour of the holders of existing debentures of the company for sums amounting in the aggregate to 350,000*l.* and interest), with the payment of all moneys for the time being owing on the security of that deed, such charge to rank as a floating charge as therein mentioned. The further material clauses of the deed provided as follows:

Clause 22. "At any time before the security hereby constituted becomes enforceable the trustees or trustee may but only if and so far as in their opinion the interests of the stockholders shall not be prejudiced thereby upon the application and at the expense of the company do or concur in doing all or any of the things following that is to say:—

"(1.) May sell and convert all or any of the mortgaged premises in the same manner as they or he could do if the primary trust for conversion had then arisen. . . . .

"(8.) May settle adjust refer to arbitration compromise and arrange all accounts reckonings controversies questions claims and demands whatsoever open unsettled or pending with any person or persons in relation to the mortgaged premises. . . . .

"(10.) Generally may act in relation to the mortgaged premises in such manner as the trustees or trustee may think expedient . . . ."

Clause 23. "The trustees or trustee shall hold all net capital

WARRINGTON J.

1909

BENTLEY'S YORKSHIRE BREWERIES, LIMITED, *In re.*

moneys arising under the last preceding clause hereof upon trust (subject to the application of the same or any part thereof for any of the purposes of that clause) to lay out the same or any part thereof if they or he shall think fit in" (inter alia) "the purchase (whether from the company or not and whether subject or not subject to any incumbrances) of other property convenient for the purposes of the company including freehold leasehold and copyhold hereditaments goodwill licences book debts rights of easement and other assets . . . . and so that any hereditaments purchased under this clause shall be conveyed or assured (subject to the incumbrances if any thereon) to the trustees or trustee in such manner as they or he shall require so as to become subject to all the trusts powers and provisions herein contained as if the same formed part of the hereditaments hereinbefore expressed to be assured . . . ."

Clause 27. "Any moneys which under the trusts herein contained ought to be invested may be invested in the names or name or under the legal control of the trustees or trustee in any of the public stocks or funds or Government securities of the United Kingdom or in the stock of the Bank of England or in any other stocks funds shares or securities by law authorised for the investment of trust moneys or may be placed on deposit in the names or name of the trustees or trustee in such bank or banks as they or he shall think fit."

From time to time since the coming into operation of the Licensing Act, 1904, the licensing authorities had refused to renew the licences of certain of the company's houses comprised in the trust deeds respectively, and the compensation moneys awarded to the company in respect of such refusals to renew had been paid to the trustees of the deeds.

The company proposed to the trustees of each of the trust deeds that they should invest the moneys in their hands in the purchase from the company of certain of its licensed premises or on mortgage of such premises, and desired that, if such purchases or mortgages could not properly be effected, the moneys should be invested in the purchase or mortgage of licensed premises belonging to other persons.

The trustees of the three deeds were desirous of assisting the

company so far as they properly could, but they had been advised that they ought not to make the purchases or mortgages proposed without the protection of an order of the Court. They accordingly took out the three following originating summonses against the company and certain persons who had been appointed to represent the debenture-holders under the respective deeds.

By the first summons (*In re Trust Deed of Henry Bentley & Co., Limited*, of December 7, 1889. *Charlesworth* v. *Bentley's Yorkshire Breweries, Limited* [1909 B. 1466]) the trustees of the deed of 1889 asked for the determination (inter alia) of the questions (1.) whether the compensation moneys awarded under the Licensing Act, 1904, could properly be applied by them as purchase-money of mortgaged premises arising under clause 11 of the deed, and (2.) whether upon the true construction of that deed they were authorized to invest the purchase-money of mortgaged premises under that clause in (*a*) the purchase or (*b*) the mortgage of licensed messuages and premises belonging either (*a*) to the company or (*b*) to third parties.

By the second summons (*In re Bentley's Yorkshire Breweries, Limited, Trust Deed* of August 31, 1893. *Day* v. *The Company* [1909 B. 1822]) the trustees of the deed of 1893 asked for the determination of similar questions with reference to clause 12 of that deed.

By the third summons (*In re Bentley's Yorkshire Breweries, Limited, Trust Deed* of December 10, 1897. *Charlesworth* v. *The Company* [1909 B. 1823]) the trustees of the deed of 1897 asked for the determination of similar questions with reference to "capital moneys" arising under clause 22 of that deed.

P. F. S. Stokes, for the plaintiffs in all three actions.

Cave, K.C., and *A. C. Clauson*, for the company. Dealing first with question 1 of each summons, the compensation moneys paid under the Licensing Act, 1904, became part of the specific charge and not of the floating charge, and was therefore paid to the trustees as being the proper persons to receive it: *Law Guarantee and Trust Society* v. *Mitcham and Cheam Brewery Co.* (1); and it is submitted that it may be applied by them either as

(1) [1906] 2 Ch. 98.

WARRINGTON J.
1909
BENTLEY'S YORKSHIRE BREWERIES, LIMITED, *In re.*

"purchase-money" arising under clauses 11 and 12 respectively of the deeds of 1889 and 1893, or as "capital moneys" arising under clause 22 of the deed of 1897: *Noakes* v. *Noakes & Co.* (1); *Dawson* v. *Braime's Tadcaster Breweries, Ld.* (2)

[WARRINGTON J. Cannot your case be put in this way, that the community purchases the difference between the value of the house when licensed and its value when unlicensed, with a view of extinguishing the licence?]

Yes; it is really a sale, although forced upon the trustees, and these moneys are the proceeds of the sale.

Percy Wheeler, for representative debenture-holders under the three deeds. On the bare facts of this case the trustees have not sold or concurred in selling within the meaning of clause 11 of the deed of 1889, clause 12 of the deed of 1893, or clause 22 of the deed of 1897.

In *Dawson* v. *Braime's Tadcaster Breweries, Ld.* (2) the trustees took active steps which brought them within the terms of their deed. The word "convert" in the clauses in question involves some voluntary act on the part of the trustees. Here the trustees have not performed any voluntary act; they have merely received into their hands the compensation moneys awarded by the justices. The case is unprovided for both by the Act and the clauses in the deeds and is outside the reasoning in *Dawson* v. *Braime's Tadcaster Breweries, Ld.* (2) The authorities are in too imperfect a state for the trustees to rely upon them. *Noakes* v. *Noakes & Co.* (1) is no authority on the question raised on the deeds of 1889 and 1893.

As regards clause 22 of the deed of 1897, the company relies on *Noakes* v. *Noakes & Co.* (1), but under that clause the trustees can only act "if and so far as in their opinion the interests of the stockholders shall not be prejudiced thereby." Here the trustees were powerless in the matter. All they had to do was to stretch out their hands for the compensation moneys. Their duty was similar to that of trustees appointed for the purposes of the Settled Land Act, namely, to receive the purchase-money on a sale carried out by a tenant for life. No conveyance of the property by them was required.

(1) [1907] 1 Ch. 64. (2) [1907] 2 Ch. 359.

WARRINGTON J. The question in this case is whether compensation moneys awarded under the Licensing Act, 1904, can be applied by the trustees under three debenture deeds, in the case of the two first as "purchase-money" arising from the property comprised in the deeds, and in the case of the third deed as "capital moneys," that being the expression used in that deed.

Now the facts are very short. [His Lordship referred to the deeds and in particular to clause 11 of the deed of 1889, clause 12 of the deed of 1893, and clauses 22 and 23 of the deed of 1897, and continued:—] Under the Licensing Act, 1904, the justices have extinguished the licences in respect of certain houses comprised in all three deeds, and the compensation moneys payable by reason of that extinction have been paid to and received by the trustees, and they now desire to know whether they can apply those compensation moneys for the purposes prescribed in the first two deeds as regards purchase-money and in the third deed as regards capital moneys.

The case seems to me to be absolutely covered by authority as regards both deeds. There are three decisions upon the point, but I think the last one in *Dawson* v. *Braime's Tadcaster Breweries, Ld.* (1), before Kekewich J., exactly covers this case. There the deed in question provided (clause 17) that at any time before the security thereby constituted became enforceable the trustees might (inter alia) sell and convert, or concur in selling and converting, all or any of the mortgaged premises in the same manner as they could do if the primary trust for conversion had then arisen, and by clause 18 they were to hold "the capital moneys" (that being the expression there used) arising under clause 17 upon trust to lay out the same in, amongst other things, the purchase of licensed premises, and Kekewich J. held that what had taken place was really a sale, and that the trustees were therefore entitled to deal with compensation moneys as capital moneys arising under that part of clause 17 which gave them power to sell. I need not read the judgment of Kekewich J. I can only say that I should be bound by it in any case, but I desire to say further that I agree with every word he said in that

(1) [1907] 2 Ch. 359.

WARRINGTON J.

1909

BENTLEY'S YORKSHIRE BREWERIES, LIMITED, *In re.*

judgment, and, moreover, I think there are some further considerations, which occur to one after discussion, which strengthen the view which he took in that case.

First of all, with regard to the two earlier deeds, the power given by clause 11 (or 12) is that the trustees shall at any time, upon the application and at the cost of the company, sell or concur in selling any part or parts of the mortgaged premises.

Now what happened in this case? The justices, by virtue of the Licensing Act, 1904, to all intents and purposes purchased for the purposes of extinction that part of the value of the licensed premises which consisted of the difference between their value as licensed premises and their value as unlicensed premises. Then did the trustees sell? I think they did. The company is the person to whom the money is awarded, but the purchase-money, by reason of the interest of the trustees, has to be paid to the trustees. They receive that money and give a discharge for it, and it seems to me that that is the only act which the vendor in a case like this has to perform, that is, to receive the purchase-money and give a discharge, because the Act itself conveys the interest, such as it is, by extinction. I think, therefore, that the act of the trustees in receiving the money is an act which they perform in their capacity of vendors. Do they perform it upon the application of the company? Quite plainly the award is made to the company. The company is the person who appears, so far as the justices are concerned, as the owner of the premises, and inasmuch as the money is paid to the trustees, I think I may infer that it is paid to them at the request or by the direction of the company, which, although technical, is a sufficient application within the meaning of that clause.

Then with regard to the last deed, where the words are a little more special, clause 22 provides that the trustees may sell, but only if and so far as in their opinion the interests of the stockholders shall not be prejudiced thereby. I think I may fairly infer that the interest of the stockholders would be prejudiced if the trustees did not receive the purchase-money, and from their receiving the purchase-money I think I may well infer that in their opinion the interest of the stockholders would not

be prejudiced. I prefer to put my decision on that ground, namely, that what really took place was a sale, rather than on the ground that the trustees are empowered under sub-clause 8 of clause 22 to do what is proposed. I therefore answer the first question in each summons in the affirmative.

Cave, K.C. The second question is whether the trustees can expend the compensation moneys in the purchase of licensed premises, and, if so, whether they can purchase licensed premises from the company. As to the first part of the question it is, it is submitted, clear upon the deeds that they can do so. As to the second part of the question, the effect of the purchase by the trustees of licensed premises from the company would be to transfer those particular premises from the floating to the specific charge, and the debenture-holders would thereby obtain the benefit of the additional security.

Percy Wheeler. I admit that no reasonable objection can be raised to the purchase by the trustees of licensed premises. The two first deeds, however, contain no express provision enabling the trustees to purchase licensed premises belonging to the company. The debenture-holders already have a floating charge on those premises.

[WARRINGTON J. That is so, but the company might sell them.]

So long as they remain in the hands of the company they are a more tangible security than the purchase-money received by the company on their sale would be.

WARRINGTON J. Two questions are now raised—first, whether the trustees can expend these compensation moneys and purchase-moneys—because they have in their hands both compensation moneys and also purchase-moneys in the strict sense—in the purchase of licensed premises; and, secondly, whether they can expend such moneys in the purchase from the company of such licensed premises.

Now, with regard to the purchase of licensed premises, I think there is really no doubt at all, because in the deeds of 1889 and 1893 the power is to expend the money "in the purchase of

WARRINGTON J.

1909

BENTLEY'S YORKSHIRE BREWERIES, LIMITED, *In re.*

any freehold copyhold or customary lands tenements and hereditaments for an estate of fee simple in possession free from incumbrances or of any leasehold messuages lands tenements or hereditaments for any term of years whereof not less than eighty years shall be unexpired at the time of such purchase and to be held in connection with the other property for the time being subject to the trusts of these presents and be conveyed or assured in such manner as the trustees or trustee shall require so as to become subject to all the trusts powers and provisions herein contained." It seems to me that the "trusts powers and provisions herein contained," when one comes to look at deeds of this sort, are much more appropriate to licensed premises than they are to any other classes of premises. I think, therefore, I should be defeating the objects of the deeds if I held that the trustees were not entitled to invest in the purchase of licensed premises; and the case is even stronger with regard to the deed of 1897, because in clause 23 express mention is made of goodwill and licences.

Then with regard to buying from the company, again I think the trustees have power to do that. With regard to the last deed there is no question, because express power for that purpose is given. With regard to the earlier deeds the power, as I have already said, is to purchase freehold or leasehold premises to be held in connection with the other property subject to the trusts of the deeds, and there is no limit. It does not say from whom the property is to be purchased; it is simply a clean power to purchase any lands. Then those lands are "to be held in connection with the other property for the time being subject to the trusts of these presents," and "the other property subject to the trusts of these presents" is the property of the company. It is not property "convenient" to be held with the other property of the company. There is no reference to the company, but it is simply that the trustees may by a purchase under this power increase the property to be held subject to the trusts of the deed. I think they may quite properly do that by purchasing from the company property which is not now subject to the trusts of the deed, but is merely subject to the floating charge created by the debentures.

Cave, K.C. The next question is as to the power of the trustees to lend the compensation money to the company by way of interim investment on the security of licensed premises. These premises are already subject to floating charges in favour of the trustees, but not to any specific mortgage. It is submitted that the trustees can lend upon the security of these premises subject to any particular security being a proper trustees' investment.

[WARRINGTON J. There is no question on the third deed except as to the amount to be advanced.]

Percy Wheeler. I admit that, if the security offered to the trustees is a proper trustees' investment, it is immaterial that the security is licensed premises. The money, however, must not be lent to the company on more advantageous terms than it would be if lent to a third party, and the trustees in advancing it to the company must exercise the same discretion as they would in that case.

WARRINGTON J. In each case here the power to invest—I am reading the words of clause 27 of the third deed, but they are substantially the same in each of the deeds—is "in any stocks funds shares or securities by law authorised for the investment of trust moneys." Mortgages are amongst the securities by law authorized for the investment of trust moneys, and it seems to me, therefore, that, subject to proper precautions being taken as to value and so on, a mortgage of a licensed house is a security authorized for the investment of trust funds.

The only question, therefore, is whether the trustees could advance the money on the security of a licensed house belonging to the company. It seems to me there is no distinction between licensed houses belonging to the company and any other licensed houses. All, however, I can do is to say that such a mortgage is within the powers of the trustees, but they must, as trustees, take the requisite precautions to see that the security is a proper one.

Solicitors: *Vincent & Vincent, for Day & Yewdall, Leeds; Haslam & Sanders, for Milne, Bury & Lewis, Manchester; Philip Johnson.*

W. L. C.

WARRINGTON J.

1909

July 28, 29.

In re HAMBROUGH'S ESTATE. HAMBROUGH *v.* HAMBROUGH.

[1909 H. 1530.]

Infant—Maintenance—Tenant in Tail in Remainder—Order sanctioning Mortgage of Real Estate—Remaindermen not Parties—Jurisdiction of Court—Disentailing Deed by way of Mortgage—Trustee Act, 1893 (56 & 57 *Vict. c.* 53), *ss.* 30, 33.

The Court has no jurisdiction to authorize a mortgage of the interest of an infant tenant in tail in remainder for the purpose of raising money for his maintenance.

In re Hamilton, (1885) 31 Ch. D. 291, and *Cadman* v. *Cadman*, (1886) 33 Ch. D. 397, followed.

In re Howarth, (1873) L. R. 8 Ch. 415, explained and distinguished.

Where, therefore, in an action, to which none of the remaindermen were parties, the Court by a first order directed trustees to raise money for the maintenance of an infant tenant in tail in remainder by means of a mortgage of his interest in the settled estate, and by a second order the Court declared that the infant was a trustee of his interest directed to be mortgaged within the meaning of s. 30 of the Trustee Act, 1893, and directed certain persons to convey that interest by way of mortgage to secure the money, and in pursuance of the second order a disentailing deed by way of mortgage was executed:—

Held, that the orders were made per incuriam and without jurisdiction, and were therefore of no effect.

Held, also, that the first order, being made without jurisdiction, was not an order directing a mortgage within the meaning of s. 30 of the Trustee Act, 1893, and that the second order, being founded on the first, was equally made without jurisdiction, and the provisions of the Trustee Act, 1893, could not support it.

Held, therefore, that, notwithstanding the orders and the mortgage, the land remained limited to the original uses of the settlement.

John Hambrough by his will, dated June 13, 1861, devised his mansion house of Steephill Castle in the Isle of Wight and ll other his freehold estates in the Isle of Wight and in the counties of Middlesex and Northampton to the use of Dudley Albert Hambrough for life, with remainder to the use of his sons successively in tail, with remainder to the use of Windsor Hambrough for life, with remainder to the use of his sons successively in tail, with remainder to the use of Arthur Hambrough for life, with remainder to the use of his sons successively in tail, with

remainder to Otho Hambrough for life, with remainder to the use of his sons successively in tail, with remainder to the use of Oscar William Hambrough for life, with remainder to the use of his sons successively in tail, with remainder to the use of Windsor Edmund Hambrough for life, with remainder to the use of his sons successively in tail, with remainder to the use of trustees upon the trusts therein expressed; and the testator devised all his copyhold and customary hereditaments to his trustees upon such trusts as would as nearly as possible correspond with the uses and trusts limited and declared concerning his freehold hereditaments.

The testator made four codicils to his will, which are not material for the purpose of this report, and died on February 4, 1863.

Dudley A. Hambrough, the first tenant for life, had issue five children, namely, two sons, Windsor D. C. A. Hambrough, who died on August 10, 1893, Albert Fitzroy Hambrough (hereinafter called the infant defendant), who was born on May 4, 1890, and three daughters.

Windsor Hambrough died on July 21, 1882, without leaving issue.

Arthur Hambrough died on December 13, 1894, without leaving issue.

The defendant Otho Hambrough was married, but had no issue living.

Oscar W. Hambrough died on September 6, 1900, without leaving issue.

Windsor E. Hambrough died on November 3, 1899, and the plaintiff, Windsor John Beauchamp Hambrough, was his eldest son.

By an indenture of charge and appointment dated May 24, 1892, Dudley A. Hambrough, in exercise of a power in that behalf contained in the testator's will, charged the settled estates with the sum of 5000*l.* as portions for his three daughters and the infant defendant, and thereby appointed the settled estates to the use of the trustees for the term of 2000 years to secure the portions.

Prior to the orders and documents next mentioned Dudley

WARRINGTON J.
1909
HAMBROUGH'S ESTATE, *In re.*
HAMBROUGH *v.* HAMBROUGH.

Hambrough had executed certain mortgages on his life interest under the will and also upon certain policies on his life and other policies to the Eagle Insurance Company which had been foreclosed, and he had been adjudicated a bankrupt. At the dates of all these orders and documents the infant defendant was tenant in tail in remainder expectant on the determination of such life interest. The orders and documents are fully stated in the judgment and were shortly as follows:

By an order dated July 20, 1896, made by Chitty J. at chambers in an action intituled In the matter of the trusts of the indenture of May 24, 1892, and in the matter of the three daughters of Dudley A. Hambrough and the infant defendant, it was ordered that the sum of 123*l.* 10*s.* should be allowed for the maintenance, education, support, and clothing of the infant defendant and his parents for six months from July 16, 1896, and that the trustees of the portions deed should be at liberty to raise by means of a mortgage or further charge of the respective portions of the two daughters and the infant defendant under the portions deed "and of the interest of the said Albert F. Hambrough in the settled estate of John Hambrough" the sum of 123*l.* 10*s.*

On November 2, 1896, a mortgage was made by the trustees in pursuance of that order.

On February 1, 1897, a further order for maintenance, similar to the order of July 20, 1896, was made by Romer J. at chambers in the same action.

Difficulties having arisen under the order of February 1, 1897, in obtaining an advance of the money required, an order dated July 26, 1897, was obtained from Romer J. at chambers in a fresh action intituled In the matter of the trusts of the will and of the trusts of the portions deed of May 24, 1892, and of the Trustee Act, 1893, and of the infant defendant and the two infant daughters. By that order the infant defendant was declared a trustee of his interest in the settled estates within s. 30 of the Trustee Act, 1893, and, Dudley A. Hambrough as protector of the settlement agreeing to concur, it was ordered that the trustees of the portions deed should be appointed to convey and should convey the interest of the infant defendant to the

mortgagees subject to the life interest of Dudley A. Hambrough and to the portions term, but discharged from the estate tail of the infant defendant and all estates in remainder, and subject to a proviso that on payment within six calendar months after the date of the mortgage of principal, interest, and costs the mortgagees should reconvey the mortgaged premises to the uses declared by the will.

On October 13, 1897, a disentailing deed by way of mortgage was executed in pursuance and following the directions of that order and was duly enrolled under the Fines and Recoveries Act, 1833.

By three further orders made in the first action, dated respectively November 1, 1897, January 9, 1899, and August 11, 1899, the allowance of 123*l.* 10*s.* for maintenance was continued.

None of the persons entitled to the settled estates in remainder after the estate tail of the infant defendant were parties to either the first action or the second action, nor were the trustees of the will parties thereto, and the orders of July 20, 1896, February 1, 1897, July 26, 1897, November 1, 1897, January 9, 1899, and August 11, 1899, were all made in the absence of such persons (including the plaintiff), except that in the first action the plaintiff was acting as guardian ad litem to the infant defendant.

On December 28, 1899, an order was made by Byrne J. at chambers in a third action sanctioning a scheme under which (inter alia) the mortgages, including the mortgage of October 13, 1897, were paid off, and by a reconveyance dated February 15, 1901, the mortgaged premises were reconveyed.

On December 11, 1908, Dudley A. Hambrough died.

This action was brought by the plaintiff (inter alia) for (1.) a declaration that none of the orders of July 20, 1896, February 1, 1897, and July 26, 1897, and none of the documents executed thereunder or in purported pursuance thereof, were binding on him, and (2.) a declaration that all the freehold and copyhold hereditaments settled by the will remained limited to the original uses declared by the will so far as they were still subsisting.

The only matter calling for a report was whether the order of July 26, 1897, and the deed of October 13, 1897, executed in

WARRINGTON J.
1909
HAMBROUGH'S ESTATE, *In re.*
HAMBROUGH *v.* HAMBROUGH.

pursuance of that order, were binding on the plaintiff, and the arguments on the other points raised at the trial are therefore omitted.

Cave, K.C., and *W. M. Hunt*, for the plaintiff. The order of July 26, 1897, was made without jurisdiction, and that order and the deed of October 13, 1897, executed in pursuance of it, are of no effect as against the plaintiff and other persons interested under the will. The Court has no jurisdiction to authorize a mortgage of the estate of an infant tenant in tail in remainder for the purpose of raising money for his maintenance: *In re Hamilton* (1); *Cadman* v. *Cadman*. (2) It is true that in *In re Howarth* (3) it was held, on an application by an infant for maintenance, that the Court had jurisdiction to charge the expenses of his past maintenance on the corpus to which he was entitled in fee; but that case has no application to the present. There the decision proceeded on the ground that, the infant being entitled in possession, a judgment for necessaries could be enforced against him by the seizure of his land in execution. Here the infant defendant was not in possession, and therefore an order against him for necessaries could not have been enforced by seizure of his estate in remainder. It was on the ground that the land of infants entitled to successive estates tail in remainder could not be delivered in execution during the continuance of the life estate that the Court of Appeal in *In re Hamilton* (1) refused to sanction the raising of a sum of money for maintenance by a charge on the real estate. That case was followed in *Cadman* v. *Cadman* (4), where Lindley L.J. said that *In re Howarth* (3) "went to the very verge of the law, and perhaps beyond it."

Even if there was jurisdiction to sanction a mortgage or charge of the infant's interest in the settled land, there was no jurisdiction to sanction a conveyance of the fee simple. That the Court purported to do under ss. 30 and 33 of the Trustee Act, 1893. (5) But in order to give the Court jurisdiction under

(1) 31 Ch. D. 291.
(2) 33 Ch. D. 397.
(3) L. R. 8 Ch. 415.
(4) 33 Ch. D. 401.

(5) The Trustee Act, 1893, provides:—

Sect. 30: "Where any Court gives a judgment or makes an order

s. 30 there must have been a judgment or order directing the sale or mortgage of the land. Here there was only an order directing a mortgage of the interest of the infant defendant in the land. The Court could not declare him a trustee of the fee simple, for it was not in him. It could only declare him a trustee of his own interest. It is submitted, therefore, that the estates remain settled to the original uses of the will so far as they are now subsisting. [They also referred to *In re Montagu.* (1)]

H. Terrell, K.C., and *E. J. Elgood*, for the defendant Otho Hambrough. The interest of the defendant Otho Hambrough is similar to that of the plaintiff, and it is not proposed to add anything to what has been urged on behalf of the plaintiff. The question is whether Romer J. had jurisdiction to make the order of July 26, 1897, and he must be taken to have decided that he had, and under those circumstances it may be that the proper course would be for the plaintiff to apply for leave to appeal against his order. *Giffard* v. *Hort* (2) was a somewhat similar case to the present, and it was there held that a decree against the tenant in tail bound the remainderman.

Rowden, K.C., and *C. E. Bovill*, for the infant defendant. The order of July 26, 1897, is binding upon the plaintiff. Although not a party to it he might have appealed from it. The only difference as regards appeals between the case of a person who is a party to an order and that of a person who is not is that in the latter leave to appeal is necessary: *In re Securities*

---

directing the sale or mortgage of any land, every person who is entitled to or possessed of the land, or entitled to a contingent right therein . . . . and is a party to the action or proceeding in which the judgment or order is given or made or is otherwise bound by the judgment or order, shall be deemed to be so entitled or possessed, as the case may be, as a trustee within the meaning of this Act; and the High Court may, if it thinks expedient, make an order vesting the land or any part thereof for such estate as that Court thinks fit in the purchaser or mortgagee or in any other person."

Sect. 33: "In all cases where a vesting order can be made under any of the foregoing provisions, the High Court may, if it is more convenient, appoint a person to convey the land or release the contingent right, and a conveyance or release by that person in conformity with the order shall have the same effect as an order under the appropriate provision."

(1) [1896] 1 Ch. 549.

(2) (1804) 1 Sch. & Lef. 386, 407.

WARRINGTON J.

1909

HAMBROUGH'S ESTATE, *In re.* HAMBROUGH *v.* HAMBROUGH.

Insurance Co. (1); *In re Markham* (2); Annual Practice, 1910, vol. 1, p. 917. "The test, in such applications as these, is, could or could not the applicant by possibility be made a party to the action by service?": per Jessel M.R. in *Crawcour* v. *Salter.* (3)

[WARRINGTON J. Service there means service of the judgment. In *Parmiter* v. *Parmiter* (4) a creditor in an administration suit whose claim had been disallowed was allowed to appeal because he was bound by the order.]

In the present case the plaintiff could have obtained leave to appeal as a matter of course. This action is in the nature of a bill of review, but there is nothing to justify it. There is no fraud; there is nothing wrong on the face of the order; the order was not by consent, and there are no subsequently discovered facts: Mitford on Pleading, 5th ed. p. 97. Under those circumstances the Court ought not to sit in review on an order of Romer J. from which the present plaintiff, as being a person affected by it, might have appealed.

[*Cave, K.C.* In *Jones* v. *Barnett* (5) it is laid down by Romer J. that, "as a rule, a stranger to an action may assert his rights without being obliged to invalidate any orders that may have been made in such action."

WARRINGTON J.: Strictly speaking, I am not asked in this action to set aside the order. All I am asked to do is to say that notwithstanding the mortgage the land remains limited to the same uses as it was before the execution of the mortgage. I agree I cannot set aside the order.

Cave, K.C. I do not press that point.]

Then as to the jurisdiction to make the order. A person having a life interest may convey the fee if the estate is ordered to be sold: Debts Recovery Act, 1830 (11 Geo. 4 and 1 Will. 4, c. 47), s. 12; Carson's Real Property Statutes, p. 395.

In *Radcliffe* v. *Eccles* (6) it was held that an infant tenant in tail might be ordered to convey under the Debts Recovery Act, 1830, s. 11, property directed to be sold for payment of debts.

(1) [1894] 2 Ch. 410, 413.
(2) (1880) 16 Ch. D. 1.
(3) (1882) 30 W. R. 329.
(4) (1860) 2 D. F. & J. 526.
(5) [1899] 1 Ch. 611, 619.
(6) (1836) 1 Keen, 130.

In re Hamilton (1) and *Cadman* v. *Cadman* (2) were decided before the last amendment to the Trustee Acts.

[WARRINGTON J. How can the Court deal with the legal estate for the purpose of providing maintenance?]

If s. 30 of the Trustee Act, 1893, applies, as it is submitted it does, there would be jurisdiction. Under that section the jurisdiction of the Court has been extended to the case where the Court, as in this case, directs a mortgage of land. In *In re Montagu* (3) an order was made declaring the infant tenant in tail trustee of the estate. The present order is validated as regards mortgagees by s. 70 of the Conveyancing and Law of Property Act, 1881.

[WARRINGTON J. Is that so, having regard to *Jones* v. *Barnett*? (4)]

J. E. Harman, for the trustees of the will.

C. Stafford Crossman, for the trustees of the portions deed.

Cave, K.C., in reply.

[WARRINGTON J. What do you say as to my giving the plaintiff an opportunity of appealing against the order?]

The point is not whether the plaintiff could have appealed against the order, but whether he is bound by it, and it is submitted that he is not so bound. I put my case in two ways. First I say that, having regard to *In re Hamilton* (1) and *Cadman* v. *Cadman* (2), the order did not bind the interest of the infant defendant, and, secondly, even if it did, it did not bind the interests of the remaindermen.

WARRINGTON J. This is a somewhat extraordinary case, and inasmuch as it is necessary for me, in order to decide it, to express an opinion whether two orders made by Romer J., my predecessor, were justified in the sense of being binding upon persons who were not then before the Court, I must examine the facts somewhat closely.

Under the will of John Hambrough, dated June 13, 1861, certain estates stood at the dates material to the present purpose settled to the use of Dudley A. Hambrough for life, with

(1) 31 Ch. D. 291.
(2) 33 Ch. D. 397.
(3) [1896] 1 Ch. 549.
(4) [1899] 1 Ch. 611.

WARRINGTON J.
1909
HAMBROUGH'S ESTATE, *In re.*
HAMBROUGH *v.* HAMBROUGH.

remainder to the use of his sons successively in tail, with remainders over. The plaintiff is a person who was then entitled to an estate tail in remainder, and the defendant Otho Hambrough is a person who was then, and is now, entitled to an estate for life in remainder, his estate preceding the estate tail of the plaintiff. At the present moment, if nothing had happened, the estates would under the will stand limited to the following uses, namely, to the infant defendant in tail in possession, Dudley A. Hambrough having died, with remainder to the defendant Otho for life, with remainder to the sons of Otho successively in tail (but he has no sons living), with remainder to the plaintiff in tail. The plaintiff insists that, notwithstanding the events which have happened, the estates still remain limited to those uses. The question is whether that contention is correct, or whether, having regard to the events which have happened, the estate tail of the infant defendant, together with all remainders expectant on that estate tail, has been barred.

There are some subsidiary questions, one of which is whether, if the estate tail of the infant defendant has been barred, it has been barred only so far as was necessary to create a certain mortgage which has since been paid off, or whether by virtue of s. 21 of the Fines and Recoveries Act, 1833, the bar is absolute and complete. A further subsidiary question is whether a certain mortgage executed on October 13, 1897, pursuant to an order of this Court made in the previous July, included not only the lands thereby mortgaged, but also moneys arising from an exercise of the power of sale and exchange contained in the will under the Settled Land Act, or otherwise from sales of hereditaments.

I now proceed to state the events which have happened upon which the present question turns. Under the will and a deed of appointment executed in pursuance of a power contained in the will the younger children of Dudley A. Hambrough were entitled to portions amounting in all to 5000*l.* Of those younger children there were originally four, three daughters and a son, the infant defendant. There had been an eldest son, Windsor D. C. A. Hambrough, who died on August 10, 1893, and thereupon the infant defendant became the eldest son entitled in expectancy to

the settled estates. Subsequently to the death of Windsor D. C. A. Hambrough, namely, in 1896, Dudley A. Hambrough became bankrupt, and his estate became vested in the trustee in his bankruptcy; it had been previously mortgaged, so that—and this is the important point—from that date he had no funds and no income out of which the infants could be maintained. Several orders were made in the course of the years 1896, 1897, and 1898, by which it was attempted to provide for the maintenance of the infant defendant, and it is upon the effect or non-effect of those orders that the present question turns.

The first order to which it is necessary to refer was made on July 20, 1896, in an action intituled In the matter of the trusts of the deed of appointment of May 24, 1892 (which was the deed appointing and settling the portions), and in the matter of the three infant daughters. It was also inter partes between the daughters as plaintiffs and the trustees of the deed as defendants, the infant defendant being made a defendant as well by his guardian ad litem. The order was made upon a summons which asked that maintenance for the infant defendant might be provided out of the portions fund and no more. I see on reference to the Master's notes that they state "Order according to the summons," but the order as drawn goes a little further. The order is this: "It is ordered that the sum of 123*l.* 10*s.* be allowed for the maintenance, education, support and clothing of the infant defendant Albert Fitzroy Hambrough and his parents for six months from the 16th July, 1896, and that such sum be raised in manner hereinafter mentioned and applied by" the trustees of the portions deed "for the purposes aforesaid." Then it was ordered that the trustees of the portions deed should be "at liberty to raise by means of a mortgage or further charge of the respective portions of" the daughters Millicent and Sybil, "and the said infant defendant under the said indenture"; and then come these words which have caused the trouble, "and of the interest of the said infant defendant in the settled estate of the testator the said sum of 123*l.* 10*s.*," and in addition thereto an amount sufficient to pay costs. How the order came to contain a direction to the trustees to raise that money by mortgage of the interest of the infant defendant

WARRINGTON J.
1909
HAMBROUGH'S ESTATE, *In re.*
HAMBROUGH *v.* HAMBROUGH.

in the settled estate I do not know. It is not asked for by the summons, and, so far as the Master's notes go, it is not in accordance with the direction of the judge. Nor do I see how under that order it would be possible for the trustees of the portions deed in any way to deal with the interest of the infant defendant. However, there is the order. That order has been the model for several subsequent orders, particularly for an order of February 1, 1897, which was made in the same proceedings and to all intents and purposes in the same form as the order of July 20, 1896.

Difficulties were found to arise under the order of February 1, 1897, in obtaining an advance of the money required, and therefore the infant defendant's advisers applied for a new and more effectual order. An application was made by originating summons dated July 9, 1897, which asked for an order in the terms in which an order was ultimately made. That application was made in a new action, an action intituled In the matter of the trusts of the will of John Hambrough—there were no trusts so far as this will was concerned, as the limitations were legal limitations—and in the matter of the trusts of the portions deed, and in the matter of the Trustee Act, 1893, and in the matter of the infant defendant. It was also inter partes, the plaintiffs being two infant daughters (Millicent and Sybil) and the infant defendant—that is important; the infant defendant was a plaintiff—and the defendants being Dudley the tenant for life and the two trustees of the portions deed. The summons came before Romer J. in chambers, and, as appears by the Master's notes, was attended by solicitors only, and he made the order of July 26, 1897. I must read the whole or nearly the whole of that order. It was as follows: "It appearing that Brantford Hartland and Thomas George Hartland have advanced the sum of 196*l.* 10*s.* 10*d.* upon the mortgage which was directed by the said order of the 20th July 1896"—that was the first of the orders—"and that they have agreed to advance (subject to this order) the amount directed to be raised by the said order of the 1st February 1897 upon the security of (inter alia) the interest of the plaintiff Albert Fitzroy Hambrough in the estates settled by the will of John Hambrough The judge doth declare that the said infant

plaintiff Albert Fitzroy Hambrough is a trustee of his interest in the freehold hereditaments settled as aforesaid and directed to be mortgaged by the said orders within the meaning of the 30th section of the Trustee Act 1893 And the said plaintiff Dudley Albert Hambrough as the protector of the settlement agreeing to concur It is ordered that the " two trustees, the trustees of the portions deed, " be appointed to convey and that they do convey the said estates for all such estate as the infant plaintiff Albert Fitzroy Hambrough could if of full age with the concurrence of the said Dudley Albert Hambrough as the protector of the settlement convey unto the said mortgagees Brantford Hartland and Thomas George Hartland and their heirs subject to the life interest of the said Dudley Albert Hambrough and to the term created by the said indenture of the 24th day of May 1892, but discharged so far only as the said Albert Fitzroy Hambrough could with such concurrence if of full age discharge the same from the estate tail of the said Albert Fitzroy Hambrough in such hereditaments and all estates rights interest and powers to take effect after the determination of such estate tail To hold the same unto and to the use of the said Brantford Hartland and Thomas George Hartland and their heirs charged with the moneys and interest and capitalised interest authorised to be charged thereon by the said orders and this order respectively and subject to a proviso that on payment within six calendar months after the date of such mortgage of all such moneys and interest and any proper mortgagees' costs in respect thereof the mortgagees do reconvey the same to the uses declared by the said will dated the 13th day of June 1861 of John Hambrough deceased of and with respect to the said hereditaments in remainder expectant on the life interest of the said Dudley Albert Hambrough but not so as to increase or multiply charges or powers of charging " ; and then there is a proviso that there should be no sale during the life of Dudley without leave of the Court, and further that if a sale was made under the power of sale the surplus proceeds should be settled to the uses declared by the will. The judge, therefore, in making that order obviously desired as far as it was possible that, while enabling a mortgage in fee of the infant defendant's interest to be created for the benefit of the infant defendant himself, the estates

WARRINGTON J.
1909
HAMBROUGH'S ESTATE, *In re.*
HAMBROUGH *v.* HAMBROUGH.

of the persons who came after him should be interfered with as little as possible. To that proceeding in which that order was made none of the persons entitled in remainder were parties. The inheritance was represented in the person of the infant defendant, but he was a plaintiff, and it was for his benefit that that order was asked. There was no other person entitled in remainder either plaintiff or defendant. Subsequently to that order being made, a mortgage was executed in pursuance of it. It is dated October 13, 1897, and is a deed combining a disentailing assurance and a mortgage. I need not read it through. So far as its terms are concerned it follows the directions of the order of July 26, 1897. The persons appointed to convey purported to convey the estate in fee simple to the two mortgagees subject to a proviso for redemption, so framed as to require the reconveyance to be made to the old uses, and the deed contained directions, which the order also enjoined, as to the surplus proceeds of sale. The deed was duly enrolled pursuant to the Fines and Recoveries Act, 1833.

Now the case made by the plaintiff is that the order and the deed do not bind him, that the deed has no effect, that the order was made without jurisdiction, and that the persons appointed to convey had no right to convey, and that the deed had no more effect than if it had been executed by a perfect stranger. Whether that contention is right is the main question I have to determine. In my opinion, for the reasons which I will give presently, that contention is right. But first, as a matter of history, it is desirable that I should refer to one or two further facts. On November 1, 1897, a further application was made for an order similar to those of July 20, 1896, and February 1, 1897, and that order was made. In January, 1898, an application was made to the judge in chambers for an order consequent on the order of November 1, 1897, and exactly corresponding with the order of July 26, 1897 (and which is now in question), which was founded on the order of February 1, 1897. On that occasion, as appears by the Master's notes, the summons was attended by counsel, and the two cases of *In re Hamilton* (1) and *Cadman* v. *Cadman* (2), relating to the jurisdiction of the Court to charge

(1) 31 Ch. D. 291. (2) 33 Ch. D. 397.

the estate tail of an infant with moneys for his maintenance, were referred to, and Romer J. refused to make the order. Those cases had not previously been referred to, but, on his attention being called to them, Romer J. refused to make the order, though it was exactly the same as the order made by him in the previous July. The mortgage has been paid off under a scheme by which certain policy moneys and proceeds of sale were dealt with for the benefit of the infant defendant, and therefore I am not concerned with the title of the mortgagees. They are gone, but they have executed reconveyances, not in the form required by the deed and order, but in another form, and, but for the view which I take, it might be a serious question whether some further conveyance on their part might not be necessary.

I cannot avoid the conclusion that the order of July 26, 1897, was made per incuriam, the attention of the judge not having been called to the two authorities to which he was afterwards referred in 1898, and in consequence of which, I think, he refused to make the order in January, 1898. Now the first question is, was there any jurisdiction in this Court to make the two orders of July 20, 1896, and February 1, 1897, as a result of which the judge purported to make the order declaring the infant defendant to be a trustee? The infant defendant was tenant in tail in remainder. The jurisdiction of the Court to make orders charging the real estate of an infant with sums for his maintenance has been discussed in several cases, to three only of which it is necessary for me to refer. The first is *In re Howarth*. (1) There an infant entitled in fee in possession was without means of support and it was necessary to make some provision for his maintenance. Past maintenance had been provided, and an application was made to charge the fee simple of the infant with the moneys so provided for his past maintenance. It was a case of past maintenance only, and the infant was entitled to the fee in possession. The matter came before the Court of Appeal, consisting of James and Mellish L.JJ. The Vice-Chancellor of the Palatine Court had doubted whether there was jurisdiction and had refused to make the order. James L.J. said: "I am of opinion that there is

(1) L. R. 8 Ch. 415, 418.

WARRINGTON J.
1909
HAMBROUGH'S ESTATE, *In re.*
HAMBROUGH v. HAMBROUGH.

jurisdiction to make an order for charging the corpus of the estate. We can only give an opinion, for the person on whom the estate will descend as heir if the petitioner should die under twenty-one not being before the Court, no order can be made by which he will be bound." I am a little puzzled by that, because you could not effectually bring the heir of a living person before the Court. The heir of the living person would be bound by an order, if the order was effectual, binding the estate in the hands of the living person. But what James L.J. appears to have meant was that, although he thought they had jurisdiction to charge the estate, he did not intend to prejudice the question whether the estate was actually charged except while held by the infant in whose favour the order was made. He goes on to say: "It is certainly for the benefit of infants who have no means of maintenance besides the rents of freehold estate that the Court should have jurisdiction to relieve them from the difficulties incident to that position. I apprehend that here if the mother were to sue the petitioner for necessaries supplied to him, a judgment might be obtained by which his inheritance would be bound, and the order asked for substantially comes to the same thing." Then he says, following two cases which had been cited, "I am of opinion that there is jurisdiction to make an order charging the inheritance with the past maintenance and costs." He made the order, founded upon the facts that the infant was entitled in possession, that the money was to be raised for past maintenance, and upon the further fact that it might fairly be treated as for "necessaries" supplied to the infant, for which judgment might be recovered and the land taken in execution, and that he was really only giving effect to that which might have been done in the more effectual way of a judgment followed by execution. I think that is the true view of that decision, and that the opening sentences of the judgment shew that James L.J. did not intend to lay down any general principle with regard to the jurisdiction of the Court to charge the corpus of an infant's estate with maintenance.

The question was further discussed in two other cases of *In re Hamilton* (1) and *Cadman* v. *Cadman.* (2) *In re Hamilton* (1)

(1) 31 Ch. D. 291. (2) 33 Ch. D. 397.

was a case in which infants were entitled to estates tail in remainder, just as is the infant in the present case, and the Court of Appeal, consisting of Lindley and Fry L.JJ., though they were most anxious—for it was a most urgent case—that the money required for the maintenance of the infants should be raised, were driven to the conclusion that they had no jurisdiction to charge the real estate or even to create a base fee for the purpose of enabling the sums for maintenance to be raised. With reference to *In re Howarth* (1) Lindley L.J. (2) says: "We hoped at first that *In re Howarth* (1) might help us. In that case the Court charged the expenses of the past maintenance of an infant on the corpus of an estate to which he was entitled in fee simple in possession. This was done on the principle that any one who maintained the infant could obtain a judgment against him which would charge his real estate, and that the order made substantially came to the same thing. We thought at first that by a subtle application of the same principle we could find a way of creating a charge in the present case. But we cannot make an order having a wider effect than a judgment at law against the infant would have. Now, though an action could be brought for necessaries supplied to the infants, no action would lie against them for the premiums on the policy of insurance"—that was peculiar to that case—"and those premiums form a part of the sum which it is sought to charge. This objection appears to me to be fatal." Then he says—and this is what is material to the present case—"By 27 & 28 Vict. c. 112, s. 1, no judgment is to affect any land until such land has been actually delivered in execution. When it has so been delivered, but not before, the Court under s. 4 can direct a sale of the debtor's interest in the land. Now, in the present case, the land cannot be delivered in execution by the sheriff, the estate of the infants being only an estate in remainder, and a Court of Equity could not during the continuance of the life estate deliver it in execution by the appointment of a receiver. We should therefore have to invent some new form of execution before we could make an order binding the estates." And upon that he held that the Court had no jurisdiction to charge even past maintenance on the estate of

(1) L. R. 8 Ch. 415. (2) 31 Ch. D. 294.

WARRINGTON J.
1909
HAMBROUGH'S ESTATE, *In re.*
HAMBROUGH *v.* HAMBROUGH.

an infant tenant in tail in remainder or on the base fee which might be created by a disentail on the part of the infant.

The matter was further discussed in *Cadman* v. *Cadman*. (1) There again infants were entitled to successive estates tail in remainder, and there was no income applicable for their maintenance. An application was made on their behalf that a sum of money for past maintenance and certain annual sums for future maintenance should be raised on the security of a charge on the estate, the tenant for life being willing to release her life estate in a portion of the property so as to give the first tenant in tail an estate in possession. That is important, because in that case it was possible to make one of the infants tenant in tail in possession by the release of the life estate. There again the Court of Appeal, consisting of Cotton, Lindley, and Lopes L.JJ., unanimously came to the conclusion that there was no jurisdiction to make an order such as was asked. All three of the Lords Justices expressed a doubt—and Lopes L.J. more than the other Lords Justices—whether the decision in *In re Howarth* (2) could be supported on principle, and they held that with regard to an estate tail, and even an estate tail in possession, it was not possible under any jurisdiction of the Court to mortgage it even for securing past maintenance and, a fortiori, for future maintenance. On the authority of those two cases I must come to the conclusion that the orders of July 20, 1896, and February 1, 1897, so far as they purported to authorize a mortgage of the interest of the infant defendant in the estates, were made without jurisdiction.

If that is so, what is the effect of it on the order of July 26, 1897? The infant defendant relies on s. 30 of the Trustee Act, 1893, and says that, the Court having ordered a mortgage of his interest, it was competent to the Court to appoint persons to convey in order to effect the mortgage, and if it was competent to the Court to do that, the mortgage could be effected by a mortgage in fee, which, of course, would involve disentailing. Sect. 30 of the Trustee Act, 1893, is as follows: [His Lordship read the section, and continued.] Then s. 33 substitutes for a vesting order in proper cases an order appointing a person to

(1) 33 Ch. D. 397. (2) L. R. 8 Ch. 415.

convey. It is under that jurisdiction that the order of July 26, 1897, was purported to be made. Now was that order justified? It has been contended that, taking the words of the section, there was no order directing a mortgage of land, but only an order directing a mortgage of the interest of the infant in the land. I do not propose to say that that argument is not well founded. I think it may well be. But I prefer to put my judgment on what I think is a stronger ground, namely, that there was no order, within the meaning of the section, directing a mortgage of the land, even assuming that the orders of July 20, 1896, and February 1, 1897, had been properly framed for that purpose. They were, in my judgment, made without jurisdiction; and, if so, there could be no jurisdiction to make the subsequent order of July 26, 1897, under s. 30 of the Trustee Act, 1893, the jurisdiction under that section depending on those previous orders. Shortly, my decision comes to this, that the orders of July 20, 1896, and February 1, 1897, so far as they purported to direct a mortgage of the infant defendant's estate, were made without jurisdiction, and, that being so, the order of July 26, 1897, founded as it is on those two orders, was equally made without jurisdiction, and the provisions of the Trustee Act, 1893, cannot support it.

When the history of the matter is looked at, it is clear that the order of July 26, 1897, was made per incuriam. The judge was not referred to *In re Hamilton* (1) and *Cadman* v. *Cadman* (2), but only to *In re Montagu* (3), which was decided under another section of the Trustee Act, 1893, and was a case of an infant being put to his election. The judge, apparently forgetting *In re Hamilton* (1) and *Cadman* v. *Cadman* (2), appears to have thought that *In re Montagu* (3) was a sufficient authority to justify him in making the order. When that case is examined, it is found that it is not a sufficient authority, and upon a subsequent occasion, when the two former cases were brought to his notice, he refused to make an order similar to the one he had made in July, 1897. I think, therefore, that the order of July 26, 1897, was made without jurisdiction and had no effect, and, therefore, the

(1) 31 Ch. D. 291. (2) 33 Ch. D. 397.
(3) [1896] 1 Ch. 549.

WARRINGTON J.

1909

HAMBROUGH'S ESTATE, *In re.*

HAMBROUGH *v.* HAMBROUGH.

mortgage which was subsequently made under it was made by persons who had no authority to make it, and the matter stands as if the mortgage had never been made. I must therefore declare that, notwithstanding the order of July 26, 1897, and the deed of October 13, 1897, the estates remain limited to the original uses declared by the will of June 13, 1861, so far as they are subsisting.

Then as to certain minor points it has been suggested that, having regard to the form of the order of July 26, 1897, and the mortgage, the old limitations were recreated by the joint effect of that order and the mortgage. There is at least a doubt—I will not say more than that—whether under s. 21 of the Fines and Recoveries Act that is the true result, but, having regard to the view which I take on the first point, it is unnecessary for me to decide whether that is so or not. It is equally unnecessary for me to decide the question whether the mortgage of October 13, 1897, included the proceeds of sale.

I think the proper form of the judgment, the interests of the mortgagees not being now in question, will be that which I have mentioned, namely, that, notwithstanding the order and the deed, the estates stand limited to the original uses of the will so far as they are still subsisting. I desire to say that I do not pretend to set aside the order of July 26, 1897. A copy of the present order ought to be indorsed on the deed of October 13, 1897, and on the enrolled copy, as was done in the case of *Hall-Dare* v. *Hall-Dare*. (1)

Solicitors: *Withall & Withall; Lawrence, Graham & Co.; W. A. Crump & Son; Fowler & Co.*

(1) (1885) 31 Ch. D. 251.

W. I. C.

DUNBAR *v.* DUNBAR.

WARRINGTON J.

1909

Oct. 21.

[1909 D. 265.]

Husband and Wife—Purchase of House—Joint Tenancy—Purchase-money paid by Husband—Resulting Trust—Advancement—Rebuttal—Decree of Nullity of Marriage.

In 1896 the plaintiff, then Miss W., was married to the defendant. In 1897 the defendant bought a house for 654*l.*, which was conveyed to him and his wife as joint tenants. The defendant paid 354*l.* out of his own money and borrowed the remaining 300*l.* on the security of a mortgage of the house. This mortgage was executed by both husband and wife and was in the ordinary form of a mortgage by joint tenants. In 1898 the plaintiff and defendant separated. In 1905 the defendant paid off the 300*l.* mortgage debt and the house was reconveyed to him and the plaintiff. In 1907 the plaintiff instituted proceedings for a declaration of nullity of marriage, and in October, 1908, a decree absolute was made whereby the marriage was declared "to have been and to be absolutely null and void." The plaintiff brought this action for a declaration that she was entitled to the house as joint tenant in fee with her late husband:—

Held, that at the date of the purchase the husband intended the house to be an advancement for the wife; that there was no implied condition that the marriage should continue; and that the plaintiff was entitled to the declaration she claimed.

On January 1, 1896, the plaintiff, then Miss W., was married to the defendant, and they lived together for more than two years. In February, 1897, the defendant acquired a monthly magazine. The plaintiff assisted him in conducting that publication, and, as he admitted, acted as editor of it for some months, till in 1898 it was sold at a profit. On July 15, 1897, a house was conveyed to the plaintiff and the defendant as joint tenants. The conveyance recited that the vendor had agreed to sell to the purchasers all the estate and interest thereinbefore specified of the vendor in the hereditaments thereinafter described and thereby conveyed free from incumbrances at the price of 654*l.*, and witnessed that in pursuance of the agreement and in consideration of the sum of "654*l.* now paid by the purchasers out of moneys belonging to them on a joint account to the vendor . . . . the vendor as beneficial owner doth hereby grant unto the purchasers" the house in question, "to hold the same

WARRINGTON J.
1909
DUNBAR v. DUNBAR.

premises unto and to the use of the purchasers their heirs and assigns as joint tenants" subject to a lease for two years from September 29, 1896. The circumstances under which this house was bought were, as stated by the defendant himself, that he and the plaintiff were then living together in the neighbourhood, and he proposed to buy the house and informed his wife of his intention to purchase it for their joint habitation, and so that in the event of his death she might succeed him, and that he might succeed her if she died. The draft conveyance was drawn in the form of a conveyance to him, and he altered it into a conveyance to him and his wife as joint tenants. In order to complete the purchase he borrowed 300*l.* on mortgage of the house. The mortgage was also dated July 15, 1897, and was executed by both husband and wife in the ordinary form of a mortgage by joint tenants. The husband paid the rest of the 654*l.* out of his own money. In August, 1898, the cohabitation between the plaintiff and defendant ceased, and she went to Australia and resided there for some years; but they continued on friendly terms, and the defendant gave the plaintiff an annual allowance. On April 7, 1905, the defendant paid off the mortgage debt of 300*l.* and interest. The plaintiff and defendant as mortgagors were parties to the reconveyance, which stated that in consideration of the said principal sum of 300*l.* and interest having been paid by the mortgagors the mortgagee thereby conveyed to the mortgagors all the premises included in the mortgage to hold the same unto and to the use of the mortgagors in fee simple freed from the principal money and interest secured by the mortgage.

In 1907 the plaintiff instituted proceedings for a declaration of nullity of the marriage, and on October 19, 1908, a decree absolute was made whereby the marriage was declared "to have been and to be absolutely null and void and that the said petitioner was and is free from all bond of marriage with the said respondent."

The plaintiff brought this action as Florence Mary Dunbar (spinster) against her late husband for a declaration that she was entitled to the house as joint tenant in fee with the defendant, an account of rents and profits received by the defendant, payment of her share, a receiver, and a sale in lieu of partition.

The defendant alleged that the conveyance was taken to himself and his wife as joint tenants on the assumption that the marriage was valid, and he counterclaimed that the plaintiff might be ordered to convey and release to him her estate and interest in the house.

Rowden, K.C., and *T. B. Napier*, for the plaintiff. The question is what was the intention of the parties in 1897 when the house was conveyed to them? If the plaintiff and the defendant had been strangers to each other there would in such circumstances have been a resulting trust in favour of the husband of the interest taken by the wife. But as between husband and wife the Court presumes an intention to make an advancement for the benefit of the wife, and that advancement is sufficient to rebut the presumption of resulting trust. Again, the presumption of advancement may itself be rebutted by evidence of the intention of the parties at the time when the conveyance was made. Here the husband has himself given evidence that he bought the house as a residence for himself and the plaintiff and the survivor of them; so the advancement in her favour is established, and there is no resulting trust to the defendant.

It is said that there was no gift to her because by virtue of the decree of nullity of marriage there never was the relationship of husband and wife between the parties which would support the presumption of advancement. But the marriage was a valid marriage in 1897; it was not void, but voidable: *Thornley* v. *Thornley*.(1) That was not a case of nullity, but it shews that dissolution of the marriage does not affect the original presumption, and therefore that the presumption of advancement does not depend upon the continuation of the marriage during the lives of the husband and wife. The intention of the parties ascertained at the time of the conveyance is the important thing, and it is clear that at that time there was no idea of the marriage coming to an end.

The fact that power to vary settlements in nullity cases is expressly given to the Court by statute shews that settlements do

(1) [1893] 2 Ch. 229, 233.

WARRINGTON J.
1909
DUNBAR v. DUNBAR.

not become inoperative because a decree of nullity is pronounced, and there is no more reason why a presumption of advancement should come to an end: Browne and Powles on Divorce Law and Practice, 7th ed. p. 161; *Hubbard* v. *Hubbard.* (1)

This is not like an annuity given during widowhood, as in *In re Boddington* (2), for after a decree of nullity there could be no such period; nor does it resemble *Soar* v. *Foster* (3), where a purchase in the joint names of a man and his deceased wife's sister was held not to raise a presumption of advancement for her, for a marriage with a deceased wife's sister was at that time not voidable, but void ab initio.

Cave, K.C., and *E. ff. Ball*, for the defendant. We admit that at the date of the conveyance the marriage was not void, but voidable; but the effect of the decree was that the circumstances must be considered as if there never had been a marriage. Therefore there was no advancement, and no rebuttal of the presumption of a resulting trust in the defendant's favour.

The plaintiff has herself repudiated the marriage and cannot insist on its being treated as being in existence. The liability of a husband for the debts of his wife does not continue after a divorce. If a wife becomes a single woman by operation of law, it is the same as if she had always remained single: *Anstey* v. *Manners.* (4) After the decree it makes no difference whether at the time the marriage was voidable only or void ab initio, as in *Soar* v. *Foster.* (3) In the present case there is not sufficient evidence of an intention of the defendant to benefit the plaintiff; and it is clear that when the reconveyance was executed in 1905, after the separation, he could not have meant to give her 150*l.* In 1897 the house was intended to be a provision for both husband and wife, but that was on the implied condition that the marriage continued. That condition ran through the whole transaction. The Court will imply any condition which must obviously have been the intention of the parties: *The Moorcock* (5); *Hamlyn & Co.* v. *Wood & Co.* (6) There was no intention to give the plaintiff any separate property apart from her husband.

(1) [1901] P. 157.
(2) (1883) 22 Ch. D. 597.
(3) (1858) 4 K. & J. 152.
(4) (1818) Gow, 10.
(5) (1889) 14 P. D. 64, 68.
(6) [1891] 2 Q. B. 488, 491.

Her interest, if she took any, would have been as a widow, not as a spinster.

No reply was called for.

WARRINGTON J. stated the facts, and continued:—The plaintiff puts her case in two ways; she says, first, this is the ordinary case of a purchase by the husband in the joint names of himself and his wife, and having regard to the relationship the presumption of resulting trust, which in the case of a purchase in the joint names of a man and a stranger would of course exist, is rebutted. She says further that even if the presumption of resulting trust is not rebutted by the mere relationship of the parties, yet in this case it is rebutted by the circumstances existing at the time of the purchase, which were that she had been doing work for the defendant, and that this purchase was in remuneration for that work. On the other hand, the defendant says that the resulting trust is not in law rebutted by the relationship, for that, having regard to the decree, the relationship did not exist, the marriage having been declared to have been and to be null and void; and, further, that the presumption of advancement which would arise from the form of the conveyance into the joint names of the husband and wife must be taken to have been subject to the implied condition that the marriage would continue as a valid marriage.

With regard to the issue of fact, the defendant denies that he had any intention of taking the conveyance in the form in which it was taken by way of remuneration to her for her services. I may dispose of this point at once. It is unnecessary to decide whether or not there was a positive intention to give her the interest in the house as reward for the work which she had done, because upon the other facts of the case, quite independently of that, I have come to the conclusion that the purchase was an advancement to the wife, and that there is no resulting trust.

Supposing we had nothing more in this case than a mere conveyance to the husband and wife jointly, what would in law be the result? It is quite true that when the decree has been pronounced the marriage is declared to have been void, but it is

WARRINGTON J.
1909
DUNBAR v. DUNBAR.

equally clear that the marriage in such a case is not a void marriage, but a voidable marriage. I will illustrate what I mean by that. It is not a void marriage in the sense in which before the recent Act the marriage with a deceased wife's sister was a void marriage. That was no marriage at all, and the parties might just as well, so far as legal consequences are concerned, have lived together without going through any ceremony. The marriage in this case was not void in that sense, and if no proceedings had been taken to avoid it, it would to all intents and purposes in law have been a valid marriage. It was therefore a voidable marriage and not a void marriage.

Now, is there any foundation for the contention that the presumption of advancement in the case of a husband and wife depends in any way upon the question whether the marriage then existing will or will not continue until the death of either of the two parties? No authority for that proposition has been advanced. So far as there is any authority, I think it is against the contention of the defendant. The authority to which I am referring is *Thornley* v. *Thornley* (1), before Romer J. In that case the conveyance, as here, had been made to the husband and wife of property bought by the husband. The marriage had been dissolved, not declared null and void, by reason of the wife's misconduct. Notwithstanding that, the presumption of advancement was held to remain, and the wife was held to be joint tenant with her husband of the property which had been conveyed to them jointly, though bought by the husband. If any such implied condition as that which has been relied upon exists, I should have thought that the necessity for it would have applied as much to the case of a marriage dissolved as to the case of a marriage declared null. The condition, if it exists at all, as counsel put it, was that this should be property which they should both enjoy jointly during their joint lives, and the survivor should enjoy it after the death of either of them. But that condition would fail of fulfilment as much if the marriage was dissolved for misconduct as if it was declared null. In either case the husband and wife cease to reside together as husband and wife at some period earlier than the death of either of them.

(1) [1893] 2 Ch. 229.

It seems to me, if there is to be any such condition, it would apply equally in the case of dissolution of marriage as in the case of nullity of marriage. I can find no authority for the proposition which has been put forward, and I think if I were to decide in accordance with the defendant's contention here I should be deciding contrary to the judgment of Romer J. in *Thornley* v. *Thornley*. (1)

But independently of authority I can see no principle on which I should imply any such condition. The doctrine of advancement depends on this, that from the relationship of the parties the Court infers that the purchase is intended for the benefit of the wife, or it may be the child, in whose name the purchase is made. The Court makes that inference from the relationship of the parties, and the inference is that that was the intention of the donor at the time the gift was made. But at the time this gift was made there was nothing in the mind of the donor as to the validity or the invalidity of his marriage. The plaintiff was at that time his wife. They were living together, and there was nothing whatever that I can see to lead the Court to suppose that the presumed intention in this case was different to the presumed intention in any other case where a purchase is made in the name of the wife. It seems to me, therefore, that I must hold that the doctrine of advancement applies prima facie to this purchase.

The presumption of resulting trust is rebutted by the presumption of advancement, but that presumption itself may be rebutted. Is there anything to rebut that second presumption? So far from there being anything to rebut it, the evidence given by the husband is in support of it, because his statement is that he did not intend this purchase to be a purchase simply for himself, but that he deliberately altered the draft in order to introduce the interests of the wife, which I now find in the conveyance as executed. It seems to me, therefore, that, so far as the deed of 1897 is concerned, the presumption is that the purchase was an advancement to the wife, and the wife is entitled to be treated as joint tenant with her husband.

Now comes a further point, which is this: Of what is she to be

(1) [1893] 2 Ch. 229.

WARRINGTON J.
1909
DUNBAR v. DUNBAR.

treated as joint tenant? The contention on the part of the defendant is this. As I have said, 300*l.* of the purchase-money was borrowed on mortgage. In the year 1905, before the decree, the defendant paid off that mortgage, and he took a reconveyance of the house to himself and his wife in accordance with the proviso for redemption in the mortgage. He did not execute the reconveyance, but of course this is the instrument under which he takes the property. The reconveyance contains a statement that the 300*l.* and interest had been paid by the mortgagors—that is, by both. The fact is, however, that it was paid by himself. The defendant puts it in two ways; he says either that all that the wife took under the presumption of advancement was the equity of redemption, and that that is all to which she is now entitled, or that, having paid a debt for which under the mortgage they were both liable, he is entitled to keep that debt on foot. Is either of these contentions sound? In my opinion they are both answered by this, that the circumstances shew that though the mortgage in form was a mortgage by both, the intention was that the money should be treated as borrowed by the husband; and it is for that reason that I referred with some emphasis to the husband's statement that he bought the house, and that it was he who directed the alteration of the form of the conveyance so that it should be a conveyance to himself and his wife jointly. He says she had nothing to do with it. In my opinion the true inference to be drawn from the facts is that it was he, as he says, who bought the house, that it is immaterial that a part of the purchase-money was raised by mortgage, and that in form the wife made herself liable to the mortgagee for that 300*l.* The real substance of it was that it was as much a purchase by him as if he had had so many sovereigns in his pocket. The repayment of the mortgage money and taking the reconveyance were nothing more than providing the rest of the purchase-money, though it was done at a subsequent date. It seems to me, therefore, that the plaintiff is entitled to be declared now joint tenant with the defendant of this house, as she asks, free from incumbrances. With regard to the account of the rents, the husband made an allowance to her until the decree, and the plaintiff asks for no

WARRINGTON J. 1909 DUNBAR v. DUNBAR.

account up to that date. There must be the declaration, therefore, asked for by the statement of claim, and an account of the rents subsequent to October 19, 1908, when the decree was made absolute, and the payment to the plaintiff of what should appear to be due to her on taking that account; an account of the repairs done by the husband; and then, inasmuch as they are entitled as joint tenants, the plaintiff is entitled to half, and can ask for a sale in lieu of partition. Therefore, after making the declaration of title, I make the ordinary order for sale in lieu of partition. The defendant must pay the costs up to and including the hearing, and the costs of the counter-claim.

Solicitors: *G. C. Topham; Tilleards.*

H. C. R.

NEVILLE J. 1909 *July* 9, 10, 14.

NOTTIDGE *v.* DERING.

[1909 N. 632.]

RABAN *v.* DERING.

[1909 R. 781.]

Settlement—Tenant for Life—Power to appoint Portions—Disentailing Deed subject to anterior Estates and Powers annexed thereto—Mortgages—Covenants for Title including Indemnity against Portions—Whether Power released—Subsequent Appointment of Portions—Priorities.

Under a marriage settlement made in 1832 estates stood limited in 1854 to the use of A. for life, remainder to the use of trustees for a long term of years to secure 20,000*l.* as portions for A.'s younger children, with remainder to B. (A.'s eldest son) in tail male, with remainders over; and the settlement contained a power for A. by deed or will to appoint the further sum of 10,000*l.* as portions for his younger children. In 1854 B., with A.'s consent, executed a disentailing deed by which the estates were assured (subject to the uses and estates created by the settlement anterior to B.'s estate tail and to all powers to such precedent estates annexed) to such uses as A. and B. should by deed jointly appoint, and they in exercise of their joint power created mortgages on the estates, and in the mortgage deeds entered into the usual covenants for title, with an indemnity against all incumbrances, including "portions." In 1896 A. died, having by his will charged the estates with the further sum of 10,000*l.* as portions for his younger children. Subsequently questions arose as to the priorities of the mortgages

NEVILLE J.

1909

NOTTIDGE v. DERING. RABAN v. DERING.

created by the exercise of the joint power of appointment and the further portions of 10,000*l.* appointed by A.'s will:—

Held, that A.'s power to appoint portions was annexed to his life estate and was not released by his concurrence in the disentailing deed.

Held, also, that A.'s covenants for title in the mortgages created under the joint power of appointment did not amount to a release by him of his power to appoint portions, and therefore that the portions appointed by his will had priority over the mortgages.

Scrope v. *Offley*, (1736) 1 Bro. P. C. 276, distinguished.

SPECIAL CASE.

By deed dated April 7, 1832 (called "the settlement"), being the settlement executed on the marriage of Sir E. C. Dering and Dame Jane Dering, estates in the county of Kent were limited (subject to a yearly rent-charge of 1000*l.* and to a term of 400 years to secure the same, which ceased in 1870) to the use of Sir E. C. Dering for his life, with remainder to uses limiting a term of 300 years to secure a yearly rent-charge of 1200*l.* for Dame Jane Dering, with remainder to trustees for a term of 600 years, with remainder to the use of the first and every other son of the marriage successively in tail male, with remainders over. The trusts of the term of 600 years were to levy and raise 20,000*l.* as portions for the children of the marriage, other than an eldest son for the time being. The settlement also contained a power for Sir E. C. Dering at any time to charge the settled estates with the further sum of 10,000*l.* for portions for the younger children of the marriage as he should by deed or will appoint, and to limit any term of years upon trusts to raise the same by sale or mortgage of the settled estates. By another deed dated May 5, 1832 (called "the supplemental deed"), Sir E. C. Dering settled certain other estates in the county of Kent to the same uses and upon and for the same trusts and subject to the same powers as were in and by the settlement limited and contained concerning the estates comprised therein.

There was issue of the said marriage E. C. Dering, who was the eldest son, and several other children. E. C. Dering attained his age of twenty-one years in July, 1854.

By deed dated October 30, 1854 (called "the disentailing deed"), E. C. Dering, with the consent of his father, Sir E. C.

Dering as protector of the settlement, assured the estates then subject to the settlement and supplemental settlement of 1832 (but subject to the rent-charge of 1000*l.* and the term of 400 years for securing the same, and subject also to the several uses, estates, terms, trusts and charges created, limited and declared in the settlement anterior to the uses or limitations to or in favour of the first and other sons of Sir E. C. Dering and Dame Jane Dering his wife in tail male, "and all powers rights and privileges to such precedent estates terms trusts and charges and every or any of them belonging or annexed or exerciseable in respect thereof") to such uses, &c., as Sir E. C. Dering or his son E. C. Dering should at any time or times during their joint lives by any deed or deeds jointly direct, limit, or appoint, and in default of such joint direction, limitation, or appointment to the uses therein declared.

At the date of the disentailing deed the estates comprised in the term of 600 years created by the settlement for raising portions for the younger children of Sir E. C. Dering and Dame Jane Dering comprised divers estates in the county of Kent, called (*a*) the Surrenden property, (*b*) the Romney property, and (*c*) the Burmarsh property. From time to time, after the execution of the settlement and supplemental settlement, and before the execution of the disentailing deed, Sir E. C. Dering created divers mortgages and charges upon his life estate in the settled estates, together with divers policies of assurance on his life, for securing divers sums of money with interest; and at the date of the disentailing deed the Romney property and some of the policies were vested in Thomas Fowke for the respective residues of certain terms of years (if Sir E. C. Dering should so long live) by way of mortgage to secure 18,000*l.* and interest, and the Burmarsh property and the rest of the policies were vested in Isabella Apletre for the respective residues of certain terms of years (if Sir E. C. Dering should so long live) by way of mortgage to secure 3600*l.* and interest; and in pursuance of an arrangement made on the execution of the disentailing deed the policies were released and reassigned to Sir E. C. Dering, and the two following deeds were executed for better securing the said mortgage debts.

NEVILLE J.
1909
NOTTIDGE v. DERING.
RABAN v. DERING.

By deed dated November 18, 1854 (called "the Romney mortgage"), after reciting (amongst other things) the Fowke mortgages, the settlement, the supplemental settlement, the disentailing deed, and the said arrangement, Sir E. C. Dering and his son E. C. Dering, in exercise of the joint power of appointment given them by the disentailing deed, appointed the Romney property to the use of Thomas Fowke, his executors, administrators and assigns, for the term of 1000 years, subject to the said rent-charge of 1000*l.* and the term of 400 years for securing the same, and to the uses, limitations, trusts and estates by the settlement and supplemental settlement created and declared anterior to the estate in tail male of the said E. C. Dering, "and to all powers and privileges to such uses limitations trusts and estates or any of them belonging or annexed or exerciseable in respect thereof," and subject to redemption on payment of the said sum of 18,000*l.* with interest. And Sir E. C. Dering and E. C. Dering jointly and severally covenanted in the usual way with Thomas Fowke that they had power to appoint; and, after default in payment of the 18,000*l.* and interest, for quiet enjoyment, "and that free and clear and freely and clearly acquitted and exonerated released and discharged or otherwise by them the said E. C. Dering and E. C. Dering or one of them their or one of their trustees executors or administrators at their or his costs and charges in all things well and sufficiently protected saved harmless and indemnified of from and against all and all manner of former" incumbrances and charges (including portions), and especially the aforesaid rent-charge of 1200*l.* limited in favour of Dame Jane Dering by the settlement, "and the portions thereby provided for the younger children of her said then intended marriage"; and for further assurance. This mortgage was now vested in the plaintiffs in the action of *Nottidge* v. *Dering*.

By another deed, also dated November 18, 1854 (called "the Burmarsh mortgage"), after recitals similar to those in the Romney mortgage, Sir E. C. Dering and E. C. Dering, in exercise of the joint power of appointment given them by the disentailing deed, appointed the Burmarsh property to the use of Isabella Apletre, her executors, administrators and assigns, for

the term of 900 years, subject to the said rent-charge of 1000*l.* and the term of 400 years for securing the same, and to the uses, limitations, trusts and estates by the settlement and supplemental settlement created and declared anterior to the estate in tail male of the said E. C. Dering, "and to all powers and privileges to such uses limitations trusts and estates or any of them belonging or annexed or exerciseable in respect thereof," and subject to redemption on payment of the said sum of 3600*l.* with interest. And Sir E. C. Dering and E. C. Dering entered into the usual covenants with Isabella Apletre for title to and further assurance of the premises similar (mutatis mutandis) to those contained in the Romney mortgage. This Burmarsh mortgage was now vested in Fanny Raban, one of the plaintiffs in the action of *Raban* v. *Dering*.

By another deed dated November 20, 1854 (called "the Romney and Burmarsh mortgage"), after reciting the settlement, the supplemental settlement, the disentailing deed, the Romney mortgage, and the Burmarsh mortgage, Sir E. C. Dering and E. C. Dering, in exercise of the joint power of appointment given them by the disentailing deed, appointed the Romney and Burmarsh properties to uses for a term of 1300 years in favour of three persons by way of mortgage to secure the repayment of a sum of 6400*l.* with interest. And Sir E. C. Dering and E. C. Dering entered into covenants for title to and further assurance of the premises similar (mutatis mutandis) to those contained in the Romney mortgage. This "Romney and Burmarsh mortgage" was now vested in Sir F. Raban and W. Raban, the other plaintiffs in the action of *Raban* v. *Dering*.

Sir E. C. Dering survived his son E. C. Dering, and died in 1896, having by his will, in exercise of the power given him by the settlement, appointed the further sum of 10,000*l.* in favour of his younger children and charged the settled estate with the same, in addition to the 20,000*l.* to be raised under the trusts of the term of 600 years.

By deed dated July 6, 1897 (called "the society's mortgage"), H. Harrison, then the sole trustee of the term of 600 years, demised the Surrenden, Romney, and Burmarsh properties to an assurance society for the unexpired residue of the said term of

NEVILLE J. 1909 NOTTIDGE v. DERING. RABAN v. DERING.

600 years by way of mortgage to secure the repayment of a sum of 30,000*l.* with interest; 10,000*l.* of this 30,000*l.* represented the 10,000*l.* appointed by the will of Sir E. C. Dering for further portions for his younger children. In September, 1897, Dame Jane Dering died.

In 1906 the defendant Sir H. E. Dering, by virtue of a resettlement of the estates made by Sir E. C. Dering and E. C. Dering soon after the disentailing deed and of divers disentailing assurances, and in the events which had happened, became and was now entitled in fee simple in possession to the settled estates subject (inter alia) to the said mortgages.

In May, 1909, owing to the depreciation that had taken place in the value of the estates, the action of *Nottidge* v. *Dering* was instituted to obtain a declaration that the Romney mortgage had priority over the society's mortgage to the extent of the 10,000*l.*, which represented the 10,000*l.* appointed by the will of Sir E. C. Dering for further portions for his younger children; and shortly afterwards the action of *Raban* v. *Dering* was instituted to obtain a similar declaration of priority in favour of the Burmarsh mortgage and the Romney and Burmarsh mortgage. The two actions were consolidated by an order of the Court, and the parties thereto concurred in stating this special case, the question submitted to the Court being whether the Romney mortgage, the Burmarsh mortgage, and the Romney and Burmarsh mortgage, or any and which of them, had priority of charge over the society's mortgage to the extent of the 10,000*l.* which represented the portions charged by the will of Sir E. C. Dering in favour of his younger children.

The assurance society were not parties to either of the actions, as their mortgage was amply secured on the Surrenden property; but they and all other parties had agreed to an apportionment of the 10,000*l.* amongst the said four mortgages, and the person most interested in contesting the claim to priority above mentioned was Sir H. E. Dering, the present tenant in fee simple of the estates, who was the sole defendant in both actions.

Peterson, *K.C.*, and *A. Whitaker*, for the plaintiffs in the first action. Sir E. C. Dering's power to appoint further portions was

a mere power in gross and was extinguished by the disentailing deed. It was not a power annexed to his life estate, and the words "subject to anterior uses &c." in that deed and in the Romney mortgage do not include this power. But if it was not extinguished it could be released, because any dealing with an estate by the donee of a power inconsistent with the exercise of the power releases it: *Foakes* v. *Jackson* (1); *Davies* v. *Huguenin* (2); and the donee of a power may bind himself not to execute it: *In re Chambers*. (3) Here the covenant for quiet enjoyment in the Romney mortgage is a covenant against disturbance by any one, and, coupled with the indemnity "against all portions," amounts to an express provision against all further portions under the settlement and operates as a release pro tanto of the power, so that Sir E. C. Dering could not subsequently exercise the power so as to give the further portions priority over the Romney mortgage.

Butcher, K.C., and *E. Rosher*, for the plaintiffs in the second action, adopted the same line of argument as to the Burmarsh mortgage and the Romney and Burmarsh mortgage, and relied on *Scrope* v. *Offley*. (4)

Jenkins, K.C., and *Errington*, for the defendant Sir H. E. Dering. The same principle applies to all the mortgages. Powers are either collateral or in gross: Sugden on Powers, 8th ed. p. 46; Farwell on Powers, 2nd ed. p. 8; and whether this power was collateral or in gross it was preserved by the disentailing deed, which was in common form: Davidson's Conveyancing, 3rd ed. vol. iii. pt. 2, p. 1293. The disentail was made expressly subject to all the uses, &c., anterior to the son's estate tail, and to all powers to the same annexed. Therefore Sir E. C. Dering's life estate was preserved, and this was a power annexed to his old dominion and was not extinguished, and the mortgages are expressly made subject to the same things as the joint power of appointment was subject to. If it was a collateral power it could not have been released prior to January 1, 1882: Farwell on Powers, 2nd ed. p. 15; Fines and Recoveries

(1) [1900] 1 Ch. 807.
(2) (1863) 1 H. & M. 730.
(3) (1847) 11 Ir. Eq. Rep. 518.
(4) 1 Bro. P. C. 276.

NEVILLE J. 1909 NOTTIDGE v. DERING. RABAN v. DERING.

Act, 1833, s. 15; *King* v. *Melling*. (1) But, assuming it was a power in gross, it was capable of being released, and the question is, Was it released? The covenants for title in the mortgages are common form and are now implied: Conveyancing Act, 1881, s. 7 (*c*). This form of covenant is considered in Platt on Covenants (p. 331), where the learned author, dealing with this form of covenant for quiet enjoyment in conjunction with an indemnity against incumbrances, says, "It is not a covenant that the estate is free, and shall remain free from incumbrances; but that the purchaser shall enjoy it free from such incumbrances. It was the opinion of Lord Chancellor Cowper that there was a difference between a covenant that the estate was free from incumbrances; and a covenant that the party should enjoy free from incumbrances; as, in the latter case, the covenant was not broken, notwithstanding the existence of incumbrances, so long as undisturbed possession was enjoyed. The consequence is, that in order to justify legal proceedings on this covenant against incumbrances, it is requisite that an actual interruption, claim, or demand, be made on the purchaser; some hindrance or prevention of enjoyment proved; for the chance alone of his being disturbed, and his liability to satisfy claimants, or in other words, the mere existence of outstanding incumbrances, unless they prevent entry and enjoyment, as in the case of a prior unexpired lease, will not constitute an immediate breach." Therefore Sir E. C. Dering's covenant against incumbrances in the mortgages only amounts to a personal covenant by him to indemnify against disturbance and does not operate as a release of his power, and the portions are entitled to priority. There is no case in which such a covenant has been held to amount to an immediate release of a power; *Scrope* v. *Offley* (2) is entirely distinguishable.

Peterson, K.C., in reply.

Butcher, K.C., in reply.

Cur. adv. vult.

July 14. NEVILLE J. delivered the following written judgment:—The question I have to decide is as to the priorities

(1) (1672) 1 Vent. 225. (2) 1 Bro. P. C. 276.

between three several mortgages—one dated November 18, 1854, for 18,000*l.*, another of the same date for 3600*l.*, and the third dated November 20, 1854, for 6400*l.*—and a charge of 10,000*l.* in favour of the younger children created by the will of Sir Edward Cholmeley Dering, who died on April 1, 1896. The estates were settled by indentures of April 7 and May 5, 1832, Sir Edward Cholmeley Dering being tenant for life under the settlement with a power by deed or will of charging portions for younger children in the events which happened to the extent of 10,000*l.* There were prior charges on the settled estates in respect of sums of 1000*l.* and 1200*l.* payable to Dame Henrietta Geary and Dame Jane Dering respectively during their lives and in respect of a sum of 20,000*l.* portions for younger children. Mr. Edward Dering, son of Sir Edward, was the first tenant in tail. By a disentailing deed dated October 30, 1854, in which Sir Edward joined as protector of the settlement, Mr. Edward Dering granted the lands subject to the uses or limitations of the settlement, subject to the several uses, estates, terms, trusts and charges created, limited and declared in the settlement anterior to the said uses and limitations, to or in favour of the first and other sons of Sir Edward in tail male, "and all powers rights and privileges to such precedent estates terms trusts and charges and every or any of them belonging or annexed or exerciseable in respect thereof," to hold upon such uses in the first instance as the father and son might jointly appoint.

Sir Edward had mortgaged his life estate in various ways prior to the disentailing deed to Mr. Fowke and Mrs. Apletre. The advances to them were partly secured by policies of insurance, and it was arranged at the time the disentailing deed was executed that these policies should be transferred to Sir Edward and the further securities after mentioned given to Fowke and Apletre. The first of these securities was created by the exercise of the joint power for further and better securing the sum of 18,000*l.* due to Fowke, and the only question which arises under this mortgage is whether it is in its terms inconsistent with the future exercise of the power of appointment for younger children of which Sir Edward was donee and which he exercised by his

NEVILLE J. 1909 NOTTIDGE v. DERING. RABAN v. DERING.

will to the extent of 10,000*l*. The first point which arises on the deed is whether the powers subject to which the appointment was made included the power to raise portions for younger children vested in Sir Edward. It is, I think, a power relating to the estate of the donee in the land in gross (see Farwell on Powers, 2nd ed. pp. 8, 9), and therefore capable of being released in 1854. Is it "belonging or annexed or exerciseable in respect of" a precedent estate? In my opinion it is. It is to be observed that the security is created by exercise of the joint power alone, and the estate thereby created is stated to be and must necessarily be, in the absence of a release by Sir Edward, subject to the estates and powers which preceded the grant by Mr. Edward Dering in the disentailing deed. If therefore this power was one of the powers subject to which the lands were granted in the disentailing deed, the mere exercise of the joint power by Sir Edward could not operate to release a power subject to which the joint power was limited. There seems to be no good ground for contending that the effect of the disentailing deed in which Sir Edward merely joined as protector of the settlement was to release his power of charging portions. It is further contended that, be that as it may, the covenant by father and son for quiet enjoyment without let by them or any other person and that free and discharged from or otherwise by them indemnified against all—"portions"—amounts to a release by the father of his power notwithstanding the fact that the covenant specifically extends to existing charges and portions. It is argued that this means that the enjoyment shall be free from incumbrances other than those specified and that the mortgagees shall be indemnified against existing incumbrances. In Platt's Law of Covenants, however, it is laid down (p. 331) that a covenant against incumbrances in similar form where no incumbrances are specified is not broken by the existence of incumbrances, but that an actual interruption of enjoyment at least by claim or demand on the purchaser is necessary to justify an action. This seems to me the correct construction of the covenant. I think, therefore, that the covenant is not inconsistent with the right of Sir Edward to exercise his power of raising portions and that his appointment by will gives the

appointees priority over this mortgage. I think the above observations cover also the case of the Burmarsh mortgage of 3600*l*. In *Scrope* v. *Offley* (1) it was held that a power of jointuring a second wife was released by the execution by the husband and his father of marriage articles followed by a subsequent settlement of the estate, subject to the power of jointuring, upon the husband, and the first wife and her family. It is not easy to ascertain what the words of the covenant against incumbrances were (pp. 277, 280), but it was certainly argued by the counsel for the respondent who was successful that the covenant (which was probably in the common form) operated as a release of the power to jointure. In that case it seems to have been held that the articles and settlement purported to settle the estate free from the power of jointuring a second wife. The present case differs in this respect, that the mortgage as I construe it purports to appoint the estate subject to the power, and I do not think that the covenant against incumbrances can be held to operate as a release of a power subject to which the appointment was made. It is to be observed that the words "to be had," relied on in *Scrope* v. *Offley* (1), do not occur in the present covenant.

It remains to consider whether the Romney and Burmarsh mortgage of November 20, 1854, which differs somewhat in form from the other mortgages, is inconsistent with the retention of the power. The principal distinction consists in the fact that the power to charge portions is recited in this mortgage. This seems to me rather to strengthen the view that it was recognized that the joint power of appointment was over an estate subject to this power to charge portions. It is recited along with the recital of other incumbrances upon the settled estates. I should add that it does not appear to me that the covenant for further assurance "according to the true intent and meaning of these presents" throws any further light upon the matter. In my opinion the portions of 10,000*l*. have priority over the three mortgages. There will be a declaration to that effect in answer to the question submitted to the Court

(1) 1 Bro. P. C. 276

NEVILLE J. 1909 NOTTIDGE v. DERING. RABAN v. DERING.

by the special case. The mortgagees can add their costs to their securities.

Solicitors for plaintiffs in the first action: *Atkey, Clarke & Atkey.*

Solicitors for plaintiffs in the second action: *Bridges, Sawtell & Co.*

Solicitors for defendant: *Patersons, Snow & Co.*

H. L. F.

NEVILLE J. 1909 *July* 23.

BARROW *v.* PARINGA MINES (1909), LIMITED.

[1909 B. 2652.]

Company—Reconstruction—Shares partly paid up—Subscribing for Shares—Commission — Underwriting Agreement — Ultra vires — Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 89.

In 1909 a limited company was formed having by its memorandum power to pay out of its funds all expenses incident to its formation and the issue of its capital, including commissions for underwriting shares, whether issued for cash or credited as partly paid; and clause 8 of its articles provided that the company might pay a commission at a rate not exceeding 25 per cent. on the amount unpaid on any shares to any person in consideration of his subscribing or agreeing to subscribe for shares. The capital of the company was divided into shares of 5*s.* each.

The formation of this new company was part of a scheme for the reconstruction of an old company of the same name that was to go into liquidation for the purpose, and it was also part of the scheme that the liquidator should sell the undertaking of the old company (whose capital had been issued in shares of 5*s.* each) to the new company for a certain number of shares in the new company credited with 3*s.* 6*d.* paid up per share to be offered to the shareholders of the old company share for share. The new company, to ensure working capital and before contracting to purchase the undertaking of the old company, entered into an agreement with certain parties called "contractors," which recited the scheme and provided (clause 2) that, if the shareholders of the old company should not within a certain period apply for 400,000 shares in the new company credited with 3*s.* 6*d.* paid per share, the liquidator should endeavour to sell to other persons such of the 400,000 shares as should not be so applied for, and, if the liquidator should be unable to sell all the said shares within three days after the expiration of such period, the contractors would within three days thereafter (1.) purchase at a price to be agreed, not exceeding $\frac{1}{2}d.$ a share, so many of the said shares as should not be so applied for by the shareholders of the old company or

sold by the liquidator: (2.) apply to the new company for an allotment of the same; (3.) pay the sum of 3*d.* per share on application for the same; and (clause 3) that when the whole of the 400,000 shares should have been applied for by shareholders of the old company or by purchasers or by the contractors, and the moneys payable on application should have been received, then the liability of the contractors under clause 2 should cease, and the new company should thereupon pay the contractors "a sum equal to 10 per cent. upon 30,000*l.* the amount of the cash assessment on the said 400,000 shares." No prospectus of the new company had been issued offering any of its shares to the public for subscription. In an action to restrain the carrying out of the agreement as being ultra vires the new company:—

Held, that the agreement was a valid underwriting agreement within s. 89 of the Companies (Consolidation) Act, 1908.

MOTION.

The defendant company was incorporated on July 19, 1909, under the Companies (Consolidation) Act, 1908, as a company limited by shares with a capital of 100*l.* divided into 400 shares of 5*s.* each. The memorandum of association of the defendant company authorized the company (inter alia) "To pay out of the funds of the company all expenses which the company may lawfully pay of or incident to the formation, registration and advertising of or raising money for the company and the issue of its capital, including brokerage and commissions for obtaining applications for or taking, placing or underwriting shares, debentures or debenture stock of the company, whether to be issued or agreed to be issued for cash or credited as partly paid . . . ."

The articles of association of the defendant company provided:

"2. Words denoting persons only shall include corporations."

"8. The company may pay a commission of an amount calculated at a rate not exceeding 25 per cent. on the amount unpaid on any shares to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares in the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares in the company."

The principal object for which the defendant company was incorporated was to acquire the assets and to undertake the liabilities of an old company of the same name (incorporated

NEVILLE J. 1909 BARROW v. PARINGA MINES (1909), LIMITED.

in 1902) under a scheme for the reconstruction of that company.

The material clauses of the scheme were as follows:

"1. A new company to be formed under the Companies (Consolidation) Act, 1908, under the name of the Paringa Mines (1909) Limited and to have a capital of 200,000*l.* divided into 800,000 shares of 5*s.* each.

"2. The new company to acquire all the assets and undertake all the liabilities of the old company.

"3. Each shareholder in the old company to be entitled as of right to claim an allotment of one share of 5*s.* nominal value of the new company credited with 3*s.* 6*d.* per share as paid up thereon in respect of each share held by him in the old company.

"4. The liability of 1*s.* 6*d.* per share to be payable 3*d.* per share on application, 3*d.* per share on allotment, and the balance of 1*s.* by calls of not more than 3*d.* per share as and when required.

"5. To the extent that the same are not claimed by shareholders of the old company, that company or its liquidator to be entitled to nominate persons as the allottees of the shares of the new company credited with 3*s.* 6*d.* per share so paid thereon."

This scheme was scheduled to an agreement dated July 21, 1909, and made between the defendant company, called "the new company," of the one part, and the Share Guarantee Trust, Limited, called "the contractors," of the other part, whereby, after reciting that the old company had a nominal capital of 200,000*l.* divided into 800,000 shares of 5*s.* each, of which 798,818 had been issued, and that the new company had been incorporated with a capital of 100*l.* divided into 400 shares of 5*s.* each, which was about to be increased to 200,000*l.* divided into 800,000 shares of 5*s.* each, and that the old company was about to go into liquidation, and to authorize its liquidator to enter into an agreement for the sale of all its undertaking and assets (subject to the payment of its liabilities) to the new company for a consideration consisting (inter alia) of 798,818 shares of the new company credited with 3*s.* 6*d.* per share paid up and having a liability of 1*s.* 6*d.* per share, and that it was intended, pursuant to the reconstruction scheme in the schedule thereto, that the shares so credited as paid up to the extent

of 3*s*. 6*d*. per share should be offered to the holders of the shares of the old company in the proportion of share for share, and that the new company was desirous of entering into the now stating agreement before entering into any agreement for the purchase of the assets and undertaking of the old company in order that the provision of the working capital of the new company might be ensured and that the subscription of the said partly paid shares might be guaranteed, it was (amongst other things) agreed as follows:

1. That the old company should on or before the 30th of August, 1909, by special resolution wind up and duly authorize its liquidator to enter into the said agreement for sale on the above terms, and that the same should on or before that date be duly executed and exchanged.

"2. If the shareholders of the old company shall not within the period or extended period to be fixed by the liquidator of the old company for the closing of the lists apply for 400,000 shares in the new company credited as paid up to the extent of 3*s*. 6*d*. per share, the liquidator of the old company shall use his best endeavours to sell to responsible persons who themselves apply such of the said 400,000 shares as shall not be so applied for and, if the liquidator shall be unable to sell all the said shares within three days after the expiration of such period, the contractors shall within three days thereafter (1.) purchase at a price to be agreed not exceeding one halfpenny per share and/or procure a responsible person or company or responsible persons or companies to purchase at that price from the liquidator of the old company so many of the 400,000 shares as shall not be so applied for by the shareholders of the old company or sold by the liquidator of the old company as aforesaid, (2.) apply or procure such purchasers to apply to the new company for an allotment of the same, (3.) pay or procure payment to the new company of the sum of threepence per share on application for the same or direct the new company to apply part of the commission payable under clause 3 hereof to such payment, and (4.) agree or procure such purchaser or purchasers to agree as such allottees to become liable for the sum of 1*s*. 3*d*. remaining payable on each of such shares.

NEVILLE J. 1909 BARROW v. PARINGA MINES (1909), LIMITED.

"3. When and so soon as the whole of the said 400,000 shares shall have been applied for by the shareholders of the old company and/or by purchasers and/or by the contractors or persons or companies procured by the contractors in accordance with clause 2 hereof, and the moneys payable on application shall have been received or appropriated in respect thereof as aforesaid by the new company and such shares shall have been available for allotment for at least three days from the receipt of the last application therefor, then the liability of the contractors under clause 2 hereof is to cease and the new company shall thereupon pay to the contractors a sum equal to ten per cent. upon 30,000*l*. the amount of the cash assessment on the said 400,000 shares less any amount so appropriated to payment of application money as aforesaid.

"4. If the contractors shall make default in purchasing or procuring a responsible person or company or responsible persons or companies to purchase from the liquidator of the old company the shares which they have agreed to purchase or procure other persons or companies to purchase under the provisions of clause 2 hereof and in paying or procuring the payment of the sum of 3*d*. per share thereon within the period by that clause provided, then it shall be lawful for the old company or its liquidator on behalf of the contractors and in their name to enter into a contract with the liquidator of the old company to purchase the shares in respect of which such default shall have been made and to apply to the new company for and to accept an allotment of the same into the names of the contractors and for the purpose aforesaid in the name of the contractors to sign execute and do any writing deed or thing which may be thought desirable fit or proper, and the new company may treat this agreement if and when produced to them subject to the fulfilment of the conditions of clause 1 hereof as an agreement by the contractors to purchase and apply to the new company for the said shares in respect of which such default shall have been made and enter the name of the contractors in the register of members accordingly and the contractors shall forthwith pay to the new company the sum of 3*d*. per share payable on application in respect of the said shares and to the liquidator such a sum not exceeding one halfpenny per share as

may have been agreed between the liquidator and the contractors as the purchase price of the said shares and these powers shall not be revoked or revocable."

The plaintiff was a shareholder of the new company and brought this action on behalf of himself and all other the shareholders in the company (except the directors) against the company and the directors, claiming a declaration that the agreement of July 21, 1909, was ultra vires the defendant company, and an injunction to restrain the defendants from carrying the same into effect; and the plaintiff now moved for an interim order. There was no evidence that any prospectus of the defendant company had been issued offering any of its shares to the public for subscription.

Bramwell Davis, *K.C.*, and *Mossop*, for the motion. The question is whether the agreement of July 21 is a valid underwriting agreement within s. 89 of the Companies (Consolidation) Act, 1908. (1) It is submitted that it is not. The section in

(1) Sect. 89 enacts as follows:

"(1.) It shall be lawful for a company to pay a commission to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares in the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares in the company, if the payment of the commission is authorised by the articles, and the commission paid or agreed to be paid does not exceed the amount or rate so authorised, and if the amount or rate per cent. of the commission paid or agreed to be paid is—

"(*a*) In the case of shares offered to the public for subscription, disclosed in the prospectus; or

"(*b*) In the case of shares not offered to the public for subscription, disclosed in the statement in lieu of prospectus, or in a statement in the prescribed form signed in like manner as a statement in lieu of prospectus and filed with the registrar of companies, and, where a circular or notice, not being a prospectus, inviting subscription for the shares is issued, also disclosed in that circular or notice.

"(2.) Save as aforesaid, no company shall apply any of its shares or capital money either directly or indirectly in payment of any commission, discount, or allowance, to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares of the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares in the company, whether the shares or money be so applied by being added to the purchase-money of any property acquired by the company or to the contract price of any work to be executed for the company,

NEVILLE J. 1909 BARROW v. PARINGA MINES (1909), LIMITED.

substance reproduces s. 8 of the Companies Act, 1900, which is repealed, and under that section an agreement not unlike the present was held to be ultra vires in *Booth* v. *New Afrikander Gold Mining Co.* (1) To subscribe for shares means to apply for shares and pay for them in cash: *Arnison* v. *Smith* (2); Palmer's Company Precedents, 9th ed. pt. I., p. 225. Here the contract is not to take up such shares as the liquidator cannot sell, because it is an agreement to *purchase* such shares at ½*d.* a share. That is not "subscribing or agreeing to subscribe" for shares within the meaning of s. 89. If the contractors intended to underwrite the shares, why could they not enter into a direct contract to subscribe for them? Further, 1*s.* 6*d.* per share on 400,000 shares amounts to 30,000*l.*, but it is doubtful what is meant by the words "cash assessment" and whether the lump sum of 3000*l.* for commission is "a rate" within the meaning of s. 89 and of the eighth article of the company. It is submitted that the agreement is really an arrangement to issue shares at a discount.

Gore-Browne, K.C., and *A. M. Wells*, for the defendants, were not called upon.

NEVILLE J. The question I have to consider is whether the agreement is a transaction which is legalized by s. 89 of the Companies (Consolidation) Act, 1908. That I think depends upon whether the agreement is in effect an agreement for underwriting the shares in the new company. Now, putting it very shortly, the old company propose to sell its assets to the new company for the issue of 400,000 shares of 5*s.* each, upon which 3*s.* 6*d.* is to be deemed to be paid up, and of course a transaction

---

or the money be paid out of the nominal purchase-money or contract price, or otherwise.

"(3.) Nothing in this section shall affect the power of any company to pay such brokerage as it has heretofore been lawful for a company to pay, and a vendor to, promoter of, or other person who receives payment in money or shares from, a company shall have and shall be deemed always to have had power to apply any part of the money or shares so received in payment of any commission, the payment of which, if made directly by the company, would have been legal under this section."

(1) [1903] 1 Ch. 295.

(2) (1889) 41 Ch. D. 348, 355.

of that kind is of no value unless you can ensure that the 400,000 shares shall be taken up, because it obviously is intended to put the new company in funds, and unless the shares are taken by somebody that object will not be attained. Consequently an agreement has been entered into whereby the contractors undertake, as I read it, that, if and so far as the shareholders in the old company do not take up the shares of the new company and the liquidator is unable to sell them, they themselves will become responsible for the amount of capital unpaid. That to my mind is an underwriting agreement. It is said, "No, the contract is not to that effect, because the contractors do not contract to apply directly to the new company for the shares in the first instance, but they agree to give $\frac{1}{2}d.$ a share to the liquidator of the old company for the shares and then to apply to the company to have those shares allotted to them." It seems to me that that was done in order to meet the legal position of the parties under the agreement, and that the only distinction between this and any other underwriting agreement is that here the underwriters may have to pay $\frac{1}{2}d.$ a share, whereas in another case they would not pay anything at all; and I think that the objection on the part of the persons interested is groundless. The articles of the company, to my mind, authorize a payment of this kind so long as it does not exceed 25 per cent. In the present case it is only 10 per cent. I think, therefore, that the agreement is a perfectly legitimate transaction, and that the motion must be dismissed with costs.

Solicitors: *Birkbeck, Moreton Thompson & Co.; Ashurst, Morris, Crisp & Co.*

H. L. F.

NEVILLE J. SOUTH SUBURBAN GAS COMPANY *v.* METROPOLITAN WATER BOARD.

1909

Oct. 14, 15.

[1908 S. 3894.]

London—Water Rate—Trade Premises—Sanitary Conveniences—"Domestic purposes"—Waterworks Clauses Act, 1863 (26 & 27 *Vict. c.* 93), *s.* 12—*Metropolitan Water Board (Charges) Act*, 1907 (7 *Edw.* 7, *c. clxxi.*), *ss.* 8, 9, 13, 16, 25.

The Metropolitan Water Board (Charges) Act, 1907, s. 8, provides for a supply of water for "domestic purposes" to any house or building within the limits of supply of the Board at a rate based on the annual rateable value of the house or building; ss. 9 and 13 prescribe the machinery for ascertaining such rate; s. 16 provides for a supply of water to any premises by meter when required for "purposes other than domestic" at rates varying with the quantity supplied; and s. 25 defines "domestic purposes" to include water closets and baths of a certain capacity, but not to include "a supply of water for . . . . any trade manufacture or business."

A gas company, whose works were within the limits of supply of the Board, provided at their works in pursuance of their statutory obligations under the Factory and Workshop Act, 1901, all necessary sanitary conveniences for their workmen. No one resided at the works, which were exempt from inhabited house duty. The company claimed to be entitled under s. 16 of the Act of 1907 to a supply of water by meter for the sanitary conveniences on the ground that such supply was "for purposes other than domestic," i.e., for trade purposes, and that their works were within the exception of "any trade manufacture or business" in s. 25 of the Act:—

Held, that the question was not the character of the premises, but the character of the purposes for which the water was used; that the supply in question was for domestic purposes; and, therefore, that the company were not entitled to a supply under s. 16, but were entitled to a supply under ss. 8, 9, and 13 of the Act.

ACTION.

The plaintiffs were a statutory company and under the powers of their special Acts carried on the trade and business of the manufacture and supply of gas within a district of South London containing in area fifteen square miles and comprising portions of the parishes of Lewisham, Camberwell, and Lambeth, a large portion of the urban and rural districts of Beckenham and Penge, and a portion of the county borough of Croydon.

For the purposes of their trade and business the plaintiffs possessed buildings, offices, and works extending over forty acres and situated at Bell Green, Lower Sydenham, and supplied themselves with water for their gasworks and engines from a stream that flowed through their said premises. No person slept or resided on any part of their said premises, nor was any part thereof charged with the payment of inhabited house duty. They employed about 400 people at their premises, which were a factory within the meaning of the Factory and Workshop Act, 1901, and under the provisions of that Act they provided (as they were bound to do) on their premises suitable lavatories and other sanitary conveniences for their workpeople, including taps for drinking water and for washing. The plaintiffs' premises were within the limits of supply of the defendant Board, and for some time the Board supplied the plaintiffs with water for their lavatories and sanitary conveniences by meter under an agreement that determined on March 25, 1908, and the charge for the water supplied under this agreement for the year ending March 25, 1908, was about 50*l.* From April, 1908, the Board continued to supply the plaintiffs for two quarters with water for the purposes aforesaid, but the parties could not agree the basis on which it was to be charged for, and in September, 1908, the Board served the plaintiffs with a demand note for 221*l.* 5*s.* 9*d.* for the 262,000 gallons of water that the plaintiffs had consumed for the quarter ending the previous June 30. This charge was based upon a rate of 5 per cent. per annum on 17,693*l.*, which was the rateable value of the plaintiffs' premises, including their mains. In November, 1908, the Board served the plaintiffs with another demand note for 221*l.* 5*s.* 9*d.* for the 211,000 gallons of water that the plaintiffs had consumed for the quarter ending the previous September 30, and this charge was based upon the like rate. The plaintiffs contended that the rate at which the Board were entitled to charge them for the water supplied during the two quarters in question was under s. 16 of the Metropolitan Water Board (Charges) Act, 1907, 11*d.* per 1000 gallons and no more, and that the sums properly payable by them for such periods were 9*l.* 16*s.* 6*d.* and 7*l.* 18*s.* 3*d.* instead of the two sums

NEVILLE J. 1909 SOUTH SUBURBAN GAS COMPANY v. METROPOLITAN WATER BOARD.

of 221*l.* 5*s.* 9*d.* In October, 1908, the plaintiffs discontinued taking water from the Board and brought this action, and claimed (1.) a declaration that the user of the water on their premises during the said period was not a user thereof for domestic purposes within the meaning of the said Act; (2.) a declaration that during the said period they were entitled to demand and the Board were under an obligation to supply water by measure for user on their premises in accordance with the scale of charges prescribed by s. 16 of the Act; and, alternatively, a declaration that, if the Board were entitled to charge them for water at a rate based on the rateable value of their premises, they were entitled to the rebate or discount prescribed by s. 9 of the Act. The Board's contention was that the water was used for domestic purposes and that under the provisions of the Act they were entitled to charge a rate based on the rateable value of the plaintiffs' premises, and by their defence they relied on s. 13 of the Act and stated their willingness to allow the rebate prescribed by s. 9 of the Act.

The plaintiffs had made no request to the Board under any of the provisions of the Act for a supply of water for domestic purposes, but the case was argued on the broad principle underlying the Act.

The sections of the Metropolitan Water Board (Charges) Act, 1907, material to the present case were the following:—

"8. Subject to the provisions of this Act the Board shall at the request of the owner or occupier of any house or building or part of a house or building occupied as a separate tenement in any street within the limits of supply in which any service main or service pipe of the Board shall be laid or of any person who under the provisions of this Act shall be entitled to require a supply of water for domestic purposes furnish to such owner or occupier or other person by means of a communication pipe or communication pipes and other necessary and proper apparatus to be provided and laid down and maintained by him and at his cost a sufficient supply of water for domestic purposes at a rate per annum which shall not exceed five per centum of the rateable value of the house or building or part of a house or building in respect of which the supply is required and such rate shall

subject to the provisions of this Act be charged uniformly under like circumstances to all consumers entitled to such supply.

"9. Where under the foregoing provisions of this Act the Board furnish a supply of water for domestic purposes to any house or building or part of a house or building occupied solely for the purposes of any trade or business or of any profession or calling by which the occupier seeks a livelihood or profit and occupied as a separate tenement which is assessed to the poor rate or other rate in which such last-mentioned rate is included in a sum exceeding three hundred pounds per annum and is not charged with the payment of inhabited house duty the Board shall make or allow from the water rate payable in respect of such supply a rebate or discount of such amount (not being less than twenty per centum or more than thirty per centum of such water rate) as the Board may from time to time determine and such rebate or discount shall from time to time be made or allowed from the water rate payable in respect of every such supply as aforesaid and at a uniform rate per centum:

"Provided that in making or allowing such rebate or discount the water rate shall not in any case be less than would have been payable in respect of any house or building or part of a house or building occupied as a separate tenement assessed to the poor rate or other rate as aforesaid in a sum of three hundred pounds per annum."

"13.—(1.) The rateable value of any house or building or part of a house or building for the purposes of this Act shall be determined by the valuation list in force at the commencement of the quarter for which the water rate accrues or (if there is no such list in force) by the last rate made for the relief of the poor or other rate in which such last-mentioned rate is included:

"Provided that if no rateable value be assigned in any such valuation list as aforesaid to any house or building or part of a house or building and such house or building or part of a house or building is not rated to any rate made for the relief of the poor or to any such other rate as aforesaid the annual value of such house or building or part of a house or building determined in manner provided by section 68 of the Waterworks Clauses Act, 1847, shall for the purposes of this Act be deemed to be the

NEVILLE J. 1909 SOUTH SUBURBAN GAS COMPANY v. METROPOLITAN WATER BOARD.

rateable value of such house or building or part of a house or building.

"(2.) Subject to the foregoing provisions of this section the Water Rate Definition Act, 1885 shall extend and apply throughout the limits of supply and in construing the proviso in section 1 of that Act the words 'rateable value' shall be substituted for the words 'annual value.'"

"16.—(1.) The Board shall at the request of any owner or occupier of any premises situate in or adjoining any street in which any main or service pipe of the Board is or shall be laid who requires for use on such premises a supply of water by measure for purposes other than domestic and by means of communication pipes and other necessary and proper apparatus to be provided laid and maintained by and at the cost of the person requiring such supply afford a supply of water by means of a meter or other fit and sufficient instrument or apparatus supplied (at the cost of such person aforesaid) or approved by the Board for measuring and ascertaining the quantity of water so supplied.

"(2.) The Board shall charge for any supply furnished by them under the last preceding sub-section of this section not exceeding the following rates for every one thousand gallons (that is to say):—

"When the quarterly consumption of water does not exceed fifty thousand gallons eleven pence;

"When exceeding fifty thousand gallons and not exceeding one hundred thousand gallons ten pence;

"When exceeding one hundred thousand gallons and not exceeding two hundred thousand gallons nine pence and one halfpenny;

"When exceeding two hundred thousand gallons and not exceeding five hundred thousand gallons nine pence;

. . . . .

"Provided also that the whole of the water taken within any railway premises which form one area for railway purposes and are connected otherwise than by the running lines of the railway company shall be reckoned as one supply and chargeable accordingly notwithstanding that the water may in fact be

delivered thereat through two or more meter pipes or other necessary and proper instruments:

"Provided further that the whole of the water furnished to any person within any premises which form one area for trading or manufacturing purposes shall be reckoned as one supply and chargeable accordingly notwithstanding that the water may in fact be delivered thereat through two or more meters pipes or other necessary or proper instruments:

. . . . . .

"25. In and for the purposes of this Act the expression 'domestic purposes' shall be deemed to include waterclosets and baths constructed or fitted so as not to be capable of containing when filled or filled up to the overflow or waste pipe (if any) more than eighty gallons but shall not include a supply of water for any of the following purposes (namely):—

"Steam gas motor and other like engines;

"Railway purposes; . . . .

"Any trade manufacture or business; . . . ."

Sir C. A. Cripps, K.C., Peterson, K.C., and *R. J. Neville*, for the plaintiffs. The plaintiffs' undertaking extending over forty acres is not "a house or building" within s. 8 of the Act. Therefore s. 9 does not apply; nor does s. 13, because that section is only intended to apply where some part of the premises is used for residential purposes, and a separate valuation has to be made of that part for the purposes of the rate. No one resides at the plaintiffs' gasworks, which are properly described as "premises" and come within that expression in s. 16 and entitle the plaintiffs to be supplied by meter at the rates prescribed in that section. The supply of water for sanitary conveniences on manufacturing premises is not a use of water for domestic purposes. No doubt such a supply is in a sense domestic, but where the conveniences are, in compliance with statutory provisions, provided on manufacturing premises and are necessary for and incidental to the carrying on of the business, and no one resides on the premises, the supply of water is for trade purposes, i.e., "for purposes other than domestic" within s. 16. But if s. 8 applies, then s. 13 provides the machinery by which the

NEVILLE J. 1909 SOUTH SUBURBAN GAS COMPANY v. METROPOLITAN WATER BOARD.

rateable value of that part of the plaintiffs' premises where the conveniences are is to be ascertained, and the plaintiffs will be entitled to the rebate prescribed by s. 9. The ambit to which the term "domestic purposes" applies is shewn by *Pidgeon* v. *Great Yarmouth Waterworks Co.* (1); *Barnard Castle Urban Council* v. *Wilson* (2); *South-West Suburban Water Co.* v. *St. Marylebone Union* (3); *Chester Waterworks Co.* v. *Chester Union* (4); *Cooke, Sons & Co.* v. *New River Co.* (5); *Frederick* v. *Bognor Water Co.* (6); *Busby* v. *Chesterfield Waterworks and Gas Light Co.* (7); *Harrogate Corporation* v. *Mackay.* (8) But the matters argued in these cases have been set at rest by s. 25 of the Act of 1907, which defines "domestic purposes" and expressly exempts "any trade manufacture or business." The plaintiffs' premises are clearly within that exception, and the purpose of the supply of water to them cannot under the circumstances be called a supply for domestic purposes. The principle of the Scotch cases of *Airdrie, Coatbridge and District Water Trustees* v. *Flanagan* (9) and *Prestwick St. Nicholas Golf Club Trustees* v. *Prestwick Corporation* (10) is in point. The sanitary conveniences at all railway stations are necessary and incidental to the carrying on of the business of railway companies, and, if the contention of the Water Board is right, the supply of water for such conveniences at railway stations is a supply for domestic purposes. That cannot be the intention of the Act.

Danckwerts, K.C., and *A. B. Shaw*, for the Board. A house or building is not confined to premises where people reside or sleep, and the meaning to be attributed to "premises" is pointed out in *Metropolitan Water Board* v. *Paine.* (11) Sect. 35 of the Waterworks Clauses Act, 1847, is similar in effect to s. 8 of the Act of 1907, but there is no definition of the words "domestic use" in the Act of 1847, and s. 12 of the Waterworks Clauses Act, 1863, which provides that a supply of water for domestic purposes "shall not include a supply for any trade manufacture or

(1) [1902] 1 K. B. 310.
(2) [1902] 2 Ch. 746.
(3) [1904] 2 K. B. 174.
(4) (1908) 98 L. T. 701.
(5) (1888) 38 Ch. D. 56; on appeal, (1889) 14 App. Cas. 698.
(6) [1909] 1 Ch. 149.
(7) (1858) E. B. & E. 176.
(8) [1907] 2 K. B. 611.
(9) (1906) 8 F. 932, 944.
(10) (1909) S. C. 94, 98.
(11) [1907] 1 K. B. 285.

business," is substantially reproduced in s. 25 of the Act of 1907. The cases on the meaning of " domestic use " in the earlier Acts are collected in Michael and Will on Gas and Water, 5th ed. pp. 311 et seq., and the ratio decidendi of those cases still applies and shews that, in considering whether a supply of water is for domestic or non-domestic purposes, the question is the purpose for which the water is used, and not the purpose for which the premises are used. If the use is for domestic purposes, then s. 8 applies; and if there is no house or building on the premises and the water is required for domestic purposes, then the annual value of the place where the conveniences are must be ascertained under s. 13, and the rate under s. 8 subject to the rebate in s. 9 is payable. If the water is used solely for the purposes of trade, then the supply is by meter under s. 16. *Cooke, Sons & Co.* v. *New River Co.* (1) really covers this case; there the premises were used for purely business purposes. The principle *of Smith* v. *Müller* (2) and *Lyons & Co.* v. *London Corporation* (3) applies. In *South-West Suburban Water Co.* v. *St. Marylebone Union* (4) Buckley J. points out that it is the character of the purpose, not the character of the premises in which the water is used, that is the important factor, and it is the principle of that case which is embodied in the Act of 1907. *Frederick* v. *Bognor Water Co.* (5) is to the same effect. The Scotch cases cited do not apply. Here there are buildings on the plaintiffs' premises in which there are these sanitary conveniences, and the purposes for which the water is used are for drinking, for washing, and for flushing the urinals and lavatories, which are domestic purposes. The plaintiffs, therefore, are not entitled to a supply under s. 16, but they are entitled to a supply under ss. 8 and 9 at a rate apportioned on the annual value of the place where the conveniences are, the value to be ascertained under s. 13.

NEVILLE J. The main question that I have to decide in this case is whether the plaintiffs, who are a gas company occupying

(1) 38 Ch. D. 56; on appeal, 14 App. Cas. 698.
(2) [1894] 1 K. B. 192.
(3) [1909] 2 K. B. 588.
(4) [1904] 2 K. B. 174, 179.
(5) [1909] 1 Ch. 149, 157.

NEVILLE J. 1909 SOUTH SUBURBAN GAS COMPANY v. METROPOLITAN WATER BOARD.

large works extending over forty acres, are entitled under s. 16 of the Metropolitan Water Board (Charges) Act, 1907, in respect of their premises, the gasworks, to a supply of water by measure "for purposes other than domestic." The question to my mind is whether the purposes for which they required the water are "other than domestic." The purposes for which they required the water are not in dispute. It was required for drinking and washing and for lavatory and other sanitary conveniences. It is said that although those purposes are prima facie domestic, yet if they are purposes ancillary to a business carried on upon premises which are used for business purposes alone, and which are not charged with inhabited house duty, or upon which there is not anybody in any sense residing, then they cease to be domestic purposes, and s. 25 of the Act, which contains a definition of what "domestic purposes" shall include, is relied upon, because "domestic purposes" are declared not to include a supply of water for, amongst other things, "any trade, manufacture, or business." Now it is said that the purposes here are non-domestic because they are necessary for the carrying on of the plaintiffs' business, inasmuch as the plaintiffs are bound under the Factory and Workshop Act, 1901, to provide for their workpeople the sanitary arrangements and supply of water which they have provided. I observe that the words "any trade manufacture or business" used in s. 25 of the Act of 1907 are identical with the words used in s. 12 of the Waterworks Clauses Act, 1863, and therefore I think that the decisions on the latter section to which my attention has been called, and particularly the judgment of Buckley J. in *South-West Suburban Water Co.* v. *St. Marylebone Union* (1), throw a light upon the construction which I ought to give to this statute. It seems to me that those decisions shew that the inquiry is, not whether the premises are used for business purposes, but whether the water is used for business purposes or for domestic purposes, and that the uses in the present case are domestic. The conclusion that such is the true construction to be placed upon s. 16 with reference to s. 25 is, I think, very much assisted by the provisions of s. 9, which provides for a rebate

(1) [1904] 2 K. B. 174, 179.

upon the water rate in cases where a house or building or part of a house or building is occupied solely for the purposes of trade or business or any profession or calling by which the occupier seeks a livelihood. It seems to me that that is an exact definition of the purposes for which the buildings of the plaintiffs in the present case are used. I come, therefore, to the conclusion that the plaintiffs are entitled to a supply under the provisions of ss. 8, 9, and 13 of the Act of 1907, and that they are not entitled to a supply for the purposes in question under s. 16 of that Act. They have come seeking for a declaration, and I think that a declaration to that effect is the extent of the relief which I can give them. I also think that in the main their contention has failed and that they must pay the costs of the action.

Solicitors: *Blyth, Dutton, Hartley & Blyth; Walter Moon.*

H. L. F.

In re THE FRIENDS' FREE SCHOOL. CLIBBORN *v.* O'BRIEN.

[1899 F. 1368.]

[LIVERPOOL DISTRICT REGISTRY.]

Charitable Trust—Society of Friends—School—Trust for "civil or religious purposes"—Uncertainty—Scheme.

Under the trusts of a deed relating to a school at L. the school premises and certain funds were settled upon educational trusts under the control of the Society of Friends, with an ultimate trust that, in case the subscribers to the school, or the Society of Friends assembling at L., determined that the school should be discontinued, the trustees should assure the trust estates and funds to such persons and "for such purposes, civil or religious," as the subscribers, or Friends assembling at L., should appoint. The deed also provided that the trustees should be members of the Society of Friends. At a duly constituted meeting of the Society of Friends and subscribers of the school a resolution was passed that the school should be discontinued, and the trust property be held for the general purposes of the Society of Friends assembling at L. There was evidence that the Society of Friends was a religious body, formed for the furtherance of religious life, and any civil purpose was subordinated to the religious element:—

Held, that the trust on the discontinuance of the school failed as a

EVE J.

1909

FRIENDS' FREE SCHOOL, *In re.*

CLIBBORN *v.* O'BRIEN.

charitable trust and was void for uncertainty; and the trust premises must be held upon trust for educational purposes, for which a scheme must be settled by the district registrar.

ADJOURNED SUMMONS.

The facts, which are taken from the judgment of the Court, are as follows: By a deed poll dated March 31, 1817, under the hands and seals of twelve individuals therein described as all of Liverpool, in the county of Lancaster, members of the Society of Friends, and also trustees appointed by and on behalf of the subscribers to an institution in the town of Liverpool aforesaid, denominated "The Duncan Street School," established for the purpose thereinafter mentioned, the trustees covenanted and declared with and to each other, and with and to the subscribers to the said institution, that certain premises therein recited as having been lately demised to them should from time to time, and at all times thereafter, be used, applied, and occupied as and for a school for affording a decent and suitable education to the children of persons and to adults in low or indigent circumstances, without any distinction on account of their religious persuasions, by the persons, and in the manner, and under and subject to the directions, rules, regulations, and restrictions to be from time to time nominated, pointed out, and given as directed at any annual or other meeting or meetings of the subscribers thereto who should be members of the Society of Friends, until the time when the funds of the said institution should be sufficient for its support from the donations or legacies which might be given, without having recourse to annual subscriptions, and then and from that time by the persons, and in the manner, and under and subject to the directions, rules, regulations, and restrictions to be from time to time nominated, given, and directed by the members of the Society of Friends assembling themselves at Liverpool, present at any such annual or other meeting or meetings, or by any committee or committees to whom the powers of such of the subscribers or Friends assembling themselves at Liverpool, as the case might be, might from time to time for that purpose be given. Then, after declaring trusts for mortgage, sale, or exchange of the trust premises (to be executed only at the request of the

subscribers who were members of the Society of Friends, or of the members of the Society of Friends assembling at Liverpool, as the case might be, and, in the case of the trust for exchange, restricted to hereditaments situated within ten miles of Liverpool), and trusts of moneys raised by mortgage or sale, and of hereditaments taken in exchange, the deed proceeded: "And upon this further trust, that in case the subscribers to the said institution, members of the Society of Friends, or the Society of Friends assembling themselves at Liverpool aforesaid, as the case may be, who shall severally be present at any meeting duly assembled for the special purpose, shall determine that the said institution or school, or either of them, shall be discontinued, dissolved, or given up, then the said trustees or trustee for the time being shall assign and assure the said trust estates hereinbefore described, and also the hereditaments to be received in exchange as aforesaid, and also any other funds of the said trust estate, unto such person or persons, in such manner and form, and for such purposes, civil or religious, as such subscribers as aforesaid, or Friends assembling at Liverpool aforesaid, as the case may be, present at such meeting, shall appoint by writing under their hands."

By subsequent provisions in the deed the election of a member of the Society of Friends, resident in Liverpool, as treasurer or secretary of the institution, the disqualification of trustees who ceased to be members of the Society of Friends, and the appointment as new trustees of members of the said society, were all dealt with.

In 1835 the trust funds were augmented by the transfer to trustees of certain railway shares, or stock, to be held upon trusts corresponding to those declared by the deed poll of March 31, 1817. By another deed poll, dated September 1, 1860, entered into when new schools were erected at Islington for the purposes of the said institution, a declaration was made by the trustees thereof that they held the premises upon the same trusts as were declared by the deed poll of March 31, 1817.

On May 10, 1909, at a meeting duly convened and properly constituted of the Society of Friends and former subscribers to the school, a resolution was passed to the effect that the school should be discontinued, and that the trust estates, hereditaments,

EVE J.
1909
FRIENDS' FREE SCHOOL, *In re.*
CLIBBORN *v.* O'BRIEN.

and funds should be held for the general purposes of the Society of Friends assembling at Liverpool.

Doubts having arisen as to the validity of the trust declared on the discontinuance of the school, a summons was issued by the trustees for the school with the object of determining whether such trust was a good charitable trust, or whether, by reason of the vagueness or uncertainty of the terms in which it was expressed, it failed as a charitable trust and therefore became void as offending the rule against perpetuities.

There was evidence that the Society of Friends was primarily formed for the furtherance of the religious life, and that any civil purpose was to be subordinate to that primary object.

Jessel, K.C., and *T. K. Nuttall*, for the plaintiffs, the trustees for the charity.

P. O. Lawrence, K.C., and *R. B. Lawrence*, for the defendant, representing the Society of Friends at Liverpool. There is a good charitable gift, having regard to the religious tenets of the society. There is no contrast of the word "civil" with "religious." All the aims and purposes of the society are religious. In the deed itself there is an overriding charitable purpose. The locality is limited, the trustees who administer the trust funds must be members of the Society of Friends, and they are under the direction of the Society of Friends resident in Liverpool. The trust here comes within two out of the four principal divisions which the word "charity" in its legal sense has been held to comprise by Lord Macnaghten in the case of *Commissioners for Special Purposes of the Income Tax* v. *Pemsel.* (1) The two divisions are (1.) trusts for advancement of religion, and (2.) trusts for other purposes beneficial to the community. In the case of *In re Macduff* (2) a gift for purposes "charitable, philanthropic or ——" was held not to be a good charitable bequest. But in the present case every act done by a member of the society is for the furtherance of religion, and religious purposes are clearly "charitable": *In re White.* (3) Other elements which may be considered in determining whether

(1) [1891] A. C. 531, 583. (2) [1896] 2 Ch. 451.
(3) [1893] 2 Ch. 41.

the gift is charitable are (1.) the persons who are to administer the funds, and (2.) the locality in which they are to be distributed: *Nightingale* v. *Goulbourn* (1); *In re Kenny* (2); *In re Garrard.* (3) In the recent case of *In re Davidson* (4) the gift was to charitable or other objects, but that is distinguishable from the present case. So are also the cases of *In re Allen* (5) and *In re Freeman.* (6) The case of *In re Scowcroft* (7) is in our favour, and in that case a gift for political and religious purposes was held to be a good charitable gift. In the present case, therefore, the whole object of the Society of Friends being religious, the gift is a purely charitable gift in the legal sense.

Sargant, for the Attorney-General. Upon the true construction of this deed the gift is void as offending against the rule against perpetuities. It is not a good charitable gift. The argument put forward is that the words "civil or religious" are practically equivalent to "religious." But the cases of *In re Freeman* (6) and *In re Davidson* (4) entirely dispose of that argument. The words "civil or religious" embrace every purpose in life. No doubt the Society of Friends carry the religious spirit into every part of their secular work, but that does not make it less a secular or civil work. It is not charitable in the ordinary sense. There is a general educational purpose in the gift, and the principle of cyprès will come in when a scheme comes to be settled.

Cur. adv. vult.

July 27. EVE J., after stating the facts, continued:—The Society of Friends do not dispute that, taking the terms of the trust as they stand "for such purposes, civil or religious," as the subscribers or members may appoint, they are wide enough to include non-charitable purposes, but they urge that any ambiguity is controlled and all uncertainty is removed when proper regard is had to the body to which the administration is committed, and to the tenets of the sect or congregation by which that administration must be directed and controlled.

In my opinion, it is quite impossible for me to hold that

(1) (1848) 2 Ph. 594.
(2) (1907) 97 L. T. 130.
(3) [1907] 1 Ch. 382.
(4) [1909] 1 Ch. 567.
(5) [1905] 2 Ch. 400.
(6) [1908] 1 Ch. 720.
(7) [1898] 2 Ch. 638.

EVE J. 1909 — FRIENDS' FREE SCHOOL, *In re.* — CLIBBORN *v.* O'BRIEN.

the objects of the trust are controlled or curtailed by the fact that the trustees are, and must be, members of a particular religious body, or, I might add, of a particularly religious body. No doubt there are cases where the appointment of a particular trustee has been treated by the Court as an element to be taken into consideration in determining whether a gift tainted with some possible ambiguity is to be treated as void for uncertainty, such, for example, as *Nightingale* v. *Goulbourn* (1), *In re Kenny* (2), and *In re Garrard* (3), but I do not think any of these decisions applicable to the circumstances of this case, and I cannot hold that the generality of the objects in this trust is limited or defined by the selection of the trustees.

Does the fact that the acts of the trustees themselves are controlled by the authority and directions of the congregation of which they are members carry the matter any further? I think not. The argument really comes to this, that the administration of the fund and the execution of the trusts are committed to a body whose profession and practice it is so to order their lives as to infuse into every action the religious convictions by which they are bound together, and that, therefore, administration by such a body, even for civil purposes, necessarily involves an element which constitutes such purposes charitable in the legal sense. I cannot accede to that argument. Its acceptance would be contrary to all authority, and would inevitably lead—not in this case, I am satisfied, but in many others—to abuse and illegality. I must therefore determine that the trust for administration of the trust estate on the discontinuance of the school is void for uncertainty, and that the trust premises are now held upon trust for educational purposes, and I must refer it to the district registrar to settle a scheme. The costs of all parties to be taxed as between solicitor and client and raised and paid out of the trust estate.

Solicitors: *Alsop, Stevens, Crooks & Co., Liverpool; Solicitor to the Treasury.*

(1) 2 Ph. 594. (2) 97 L. T. 130.
(3) [1907] 1 Ch. 382.

G. M.

END OF VOL. II.

The Mode of Citation of the Volumes of the *Law Reports*, commencing January 1, 1909, will be as follows :—

In the First Series,
[1909] 1 Ch. [1909] 2 Ch.

In the Second Series,
[1909] 1 K. B. [1909] 2 K. B. [1909] P.

In the Third Series,
[1909] A. C.

INDEX.

ABANDONMENT — Tramway — Sale of undertaking before works completed — Successors in title—Whether undertaking "abandoned" by company – – **540**
See TRAMWAYS.

ACCELERATION—Settlement - "Eldest son"—Accelerating period of distribution—Younger son afterwards becoming eldest son – – – – – **239**
See SETTLEMENT.

ACCOMMODATION WORKS—Level crossing—Agricultural land—Change of condition—Easement—Alteration of user—Tennis club – – – – **48**
See RAILWAY.

ACCOUNT—Arbitration—Treatment of summons as summons for account—Undertaking by defendants to furnish account **121**
See ARBITRATION.

ACCOUNTS—Evidence — Admissibility - Entry of deceased person against interest **382**
See TRUSTEE.

ACKNOWLEDGMENT — Innocent breach of trust — Appropriation by solicitor — Limitations, Statute of—Payment of interest to tenant for life – – **382**
See TRUSTEE.

ACTION QUIA TIMET—Indemnity—Joint and several guarantee of overdraft at bank —No demand by bank for payment—Parties – – – – – **401**
See PRINCIPAL AND SURETY.

ADJUDICATION—Bankruptcy – – **492**
See BANKRUPTCY. 1.

ADMINISTRATION — *Will — Executors in England—Indian Assets—Letters of Administration as on an Intestacy obtained by Fraud in India—Sale of Indian Assets by Fraudulent Administrator—Purchaser for Value without Notice—Revocation of Indian Letters of Administration—Title of Executors—Indian Succession Act*, 1865 (*Act X. of* 1865), *ss.* 2, 3, 5, 179, 180, 187, 188, 190, 191, 234, 242, 243, 260, 262, 269, 278.

In 1898 a testator, domiciled in England, died possessed of English and Indian assets. The Indian assets comprised shares in the Bank of Bengal, and the share certificates were in the custody of C., the testator's agent at Calcutta. The executors in England remained in ignorance of the testator's Indian assets until 1903, when they discovered that in 1902 C. had by fraud obtained from the High Court at Calcutta the grant of letters of administration to the testator's Indian assets as on an intestacy, and acting as such administrator had sold the bank shares in the open market at Calcutta and squandered the proceeds. Some of the shares C. so sold and transferred to T., who was a purchaser for value without notice. C. was prosecuted for the fraud and convicted, and the grant of letters of administration to him was revoked, and fresh letters of administration with a copy of the testator's will annexed were granted to the Administrator-General of Bengal. In an action by the executors against T. and the Administrator-General claiming to be entitled to the shares T. had purchased from C. on the ground that the grant of letters of administration to the latter was void ab initio :—

Held, that, on the true construction of the provisions of the Indian Succession Act, 1865, the grant of letters of administration to C. was not void ab initio, but only void as from the date of the order of revocation.

Held, therefore, that the sale of the shares by C., qua administrator, to T. was valid and conferred on the latter a good title to the shares.

Ellis v. *Ellis*, [1905] 1 Ch. 613, distinguished.
CRASTER *v.* THOMAS – – **Neville J. 348**

ADVANCEMENT—Husband and wife—Purchase of house — Joint tenancy — Purchase-money paid by husband—Advancement — Rebuttal — Decree of nullity of marriage – – – – – **639**
See HUSBAND AND WIFE.

ADVOWSON—In gross—Foreclosure—Equitable mortgage—Stale demand—"Land" **519**
See MORTGAGE. 1.

AFTER-ACQUIRED PROPERTY—Undischarged bankrupts – – – – **195**
See BANKRUPTCY. 2.

AGREEMENT.
See under CONTRACT.

ANNUITY — *Charge on Income or Capital — Direction to pay out of Income — Indefinite Period—Absolute Gift of Corpus "subject to the aforesaid Annuities"—Will—Construction.*

A testator, by his will, gave his real and the residue of his personal estate to his brother upon trust for sale and conversion, and to hold the proceeds "upon trust to pay out of the income thereof the sums following, that is to say" one clear annuity to each of the three defendants for her separate use without power of anticipation, and "subject to the aforesaid annuities" the testator directed that the fund should be held upon trust for his brother absolutely.

The income had recently proved insufficient for the payment in full of the annuities:—

Held, having regard to the terms of the gift over, that the annuities were a charge upon the corpus.

Decision of Joyce J., [1909] 1 Ch. 485, varied. *In re* HOWARTH. HOWARTH *v.* MAKINSON **C. A. 19**

APPOINTMENT—Power of.
See under POWER OF APPOINTMENT.

ARBITRATION—*Practice—Agreement to refer—Legal Proceedings—Application for Stay—Step in Proceedings — Summons for Directions — Treatment of Summons as Summons for Account under Order XV.—Acquiescence by Defendants without Protest—Undertaking by Defendants to furnish Account—Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *s.* 4.

Attendance by defendants before a Master on the usual summons for directions taken out by the plaintiff, which the Master proposed to treat as a summons for an account under Order XV., and giving an undertaking to furnish an account as a term of the summons standing over, is taking a step in the proceedings within the meaning of s. 4 of the Arbitration Act, 1889, and the defendants are thereby precluded from obtaining a stay of proceedings under that section.

It is not necessary in such a case that an order should actually have been made.

County Theatres and Hotels, Ld. v. *Knowles*, [1902] 1 K. B. 480, followed. OCHS *v.* OCHS BROTHERS – – – **Warrington J.** 121

ASSETS — Company — Winding-up — Surplus assets — Preference shares—Preference on repayment of capital – – **187**
See COMPANY. 2.

ASSIGNS—Building scheme—Restrictive covenants—Rights of purchasers inter se — Benefit annexed to land – – **305**
See VENDOR AND PURCHASER. 1.

ATTORNEY-GENERAL—Action by—Mandatory injunction—Laches—Delay – **505**
See CANAL COMPANY.

BANK—*Banker's Lien—Stockbroker—Authority to borrow — Pledge of Client's Security—Overdraft—Special Borrowing.*

Though bankers have a general lien upon the securities of a customer deposited with them to secure an overdraft, this lien does not attach to securities deposited by a customer and known to the bank to belong to some other person and to have been deposited for a special purpose.

Where a customer draws a cheque for a sum in excess of the amount standing to the credit of his current account, it is in effect a request for a loan, and if the cheque is honoured the customer has borrowed money; but it does not follow that a transaction of this kind is a borrowing upon security not belonging to the customer and deposited for another purpose.

Hambro v. *Burnand*, [1904] 2 K. B. 10, distinguished. CUTHBERT *v.* ROBARTS, LUBBOCK & Co. – – – – – – **C. A. 226**

—— Indemnity — Action quia timet — Present debt—No demand by bank for payment — Parties – – – – – **401**
See PRINCIPAL AND SURETY.

BANKRUPTCY — *Adjudication — Secured Creditors — Separate Securities—Proof—Lumping Debts and Securities—Aggregate Assessed Value—Shares in Ships — Vendor's Lien—Admission of Proof—Redemption of One of the Securities—Life Policies—Payment of Premiums from Date of Receiving Order — Salvage — Interest.*

P. was adjudicated bankrupt in August, 1899. B. K. & Co., who had various debts and various securities, sent in their proof as secured creditors, lumping together their debts and securities and claiming to prove for the balance. The securities consisted of (1.) a vendor's lien on ship shares, and (2.) a mortgage of policies, a debt, and freeholds. The trustee asked for details of value, and (1.) was assessed at 1325*l.*, and the property in (2.) at 2481*l.*, making in the aggregate 3806*l.* The trustee, however, did not object to the proof being made for a lump sum, nor did he require the separate values of the securities to be assessed in the proof, but he admitted the proof to rank for the amount claimed less 3806*l.*, the aggregate assessed value of the securities. Subsequently a scheme for a composition was approved, and on payment of the composition the bankruptcy was annulled and the outstanding estate of P. was ordered to revest in him. A subsequent incumbrancer on the freeholds included in mortgage (2.) having claimed to redeem, B. K. & Co. contended that redemption could now only be obtained on payment of the full sum of 3806*l.*:—

Held (reversing the decision of Warrington J.), that the trustee in bankruptcy could not, by accepting the securities as worth the aggregate sum assessed, confer upon the secured creditor any part of the bankrupt's property to which the secured creditor was not entitled, or compel a mortgagee to put a separate value on two

BANKRUPTCY—*continued.*

different properties included in the same security, and that mortgage (2.) could be redeemed for 2481*l.* after allowing for what had already been received by the mortgagees on this security. *Pearce* v. *Bullard, King & Co.*, [1908] 1 Ch. 780, overruled on this point.

But *held* also that B. K. & Co. were entitled to be repaid all premiums paid by them on the life policies from the date of the receiving order with interest from the same date. *In re* PEARCE - - - - - - **C. A. 492**

2. —— *Undischarged Bankrupts — After-acquired Property—Purchase of Real Estate as Partners—Sale to a Company—Intervention of Trustees in Bankruptcy—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 44, 54—*Partnership Act*, 1890 (53 & 54 *Vict. c.* 39), *s.* 22.

The principle of *Cohen* v. *Mitchell*, (1890) 25 Q. B. D. 262, applies to after-acquired real estate which undischarged bankrupts purchase as partners for partnership purposes and sell and convey to a bona fide purchaser for value before their respective trustees in bankruptcy intervene. *In re* KENT COUNTY GAS LIGHT AND COKE COMPANY - - - **Neville J. 195**

—— Restrictive covenant — Bankruptcy of lessee—Re-entry by covenantor—Liability of covenantor for his assigns—Past breach - - - - **252**
See COVENANT.

BILL OF COSTS—Solicitor.
See under SOLICITOR.

BORROWING — Banker's lien — Stockbroker — Authority to borrow—Pledge of client's security — Overdraft — Special borrowing - - - - - - **226**
See BANK.

BREACH OF COVENANT.
See under COVENANT.

BREACH OF TRUST.
See under TRUSTEE.

BREWERY COMPANY—*Debenture Trust Deed—Mortgaged Licensed Premises—Security not yet enforceable — Trustees' Powers — Power to sell and convert—Investment of Proceeds of Sale—Non-renewal of Licences—Licensing Act*, 1904 (4 *Edw.* 7, *c.* 23), *s.* 2—*Compensation*—"*Capital Moneys*"—"*Purchase-moneys*"—*Applicable as Proceeds of Voluntary Sale—Purchase of or Investment on Mortgage of Licensed Premises of Company.*

Where a brewery company has executed a trust deed to secure debentures with the usual clause providing that the trustees shall on the company's application sell or concur in selling any part of the mortgaged premises and hold the proceeds on trust for reinvestment, and the licences of part of the mortgaged premises have been taken away under the Licensing Act, 1904, such a proceeding is a sale, and the compensation moneys awarded under the Act are "purchase-moneys" or "capital moneys" within the meaning of the trust deed.

The trustees in such a case, if possessed of the requisite powers, may invest the "purchase" or "capital moneys" in the purchase or on mortgage of licensed properties, and, if so advised, in the purchase or on mortgage of licensed premises of the company.

Dawson v. *Braime's Tadcaster Breweries, Ld.*, [1907] 2 Ch. 359, followed. *In re* BENTLEY'S YORKSHIRE BREWERIES, LIMITED **Warrington J. 609**

BUILDING LAND — Restrictive covenant — Plans to be submitted — Breach of covenant by lessee — Bankruptcy of lessee — Re-entry by covenantor — Liability of covenantor for his assigns - - - - - **252**
See COVENANT.

BUILDING SCHEME—Restrictive covenants—Rights of purchasers inter se — Benefit annexed to land—Assigns - - **305**
See VENDOR AND PURCHASER. 1.

BY-LAWS — New street — Footway forming principal access to cottages—Width and construction - - - - **265**
See LOCAL GOVERNMENT. 2.

CANAL COMPANY—*Diversion of Water from River — Statutory Powers — Urban District Council—Riparian Owners—Statutory Power to draw Water from River—Action by Attorney-General — Mandatory Injunction — Laches — Delay—Union and Grand Junction Canal Act*, 1810 (50 *Geo.* 3, *c.* 122)—*Rugby Waterworks Act*, 1863 (26 & 27 *Vict. c. xxxiii.*)—*Rugby Water and Improvement Act*, 1901 (1 *Edw.* 7, *c. cclxix.*).

By an Act passed in 1810 a canal company, thereby incorporated, was empowered to make a canal and other works and to take the waters of a certain river and its tributary streams for the purpose of supplying the canal, but was prohibited from reducing the flow of the river below a certain average to be ascertained as therein provided. The canal works were completed in 1837 and had since been in operation without complaint until 1901. By another Act passed in 1894, and reciting that the canal and works had been duly constructed in accordance with the Act of 1810, the canal and undertaking were transferred to the defendants. The plaintiffs, an urban district council, had statutory powers to supply water in their district, and to draw from the river at a point below the canal works. They had also acquired property upon the banks of the river.

In an action by the Attorney-General at the relation of the plaintiff council, and by the plaintiff council, for an injunction to restrain the defendants from diverting from the river more water than they were entitled to under the Act of 1810, and for an injunction to restrain them from permitting the works to remain so constructed as not to comply with the Act:—

Held, that the defendants had only allowed the works, executed more than sixty years ago, to operate as they had done from the first, and had acquired by lapse of time an absolute right

CANAL COMPANY—*continued.*

to the use of the water diverted by those works; the action of the plaintiffs as distinct from the claim of the Attorney-General therefore failed.

Held, further, with respect to the action by the Attorney-General, that the Court had a discretion as to granting a mandatory injunction in such a case, and, having regard to the length of time which had elapsed without objection or complaint, no such injunction ought to be granted. ATTORNEY-GENERAL *v.* GRAND JUNCTION CANAL COMPANY – – **Joyce J. 505**

CAPITAL — Reduction of — Lost capital — Evidence of loss – – – – **552**
See COMPANY.

—— Will — Annuity — Charge on income or capital – – – – – **19**
See ANNUITY.

CASES:—

—— *Attorney-General* v. *Clerkenwell Vestry*, [1891] 3 Ch. 527.
Applied by C. A. EAST BARNET VALLEY URBAN COUNCIL *v.* STALLARD **[1909] 2 Ch. 555**

—— *Attorney-General* v. *West Gloucestershire Water Co.*, [1909] 1 Ch. 636.
Affirmed by C. A. – **[1909] 2 Ch. 338**

—— *Barnes* v. *Brown* – – [1909] 1 K. B. 38
Overruled by C. A. BELLERBY *v.* HEYWORTH – – **[1909] 2 Ch. 23**

—— *Bond* v. *Barrow Hæmatite Steel Co.*, [1902] 1 Ch. 353, 362.
Applied by Swinfen Eady J. *In re* ACCRINGTON CORPORATION STEAM TRAMWAYS COMPANY **[1909] 2 Ch. 40**

—— *Brockman, In re* – – [1909] 1 Ch. 354
Reversed on appeal – **[1909] 2 Ch. 170**

—— *Brown* v. *Dunstable Corporation*, [1899] 2 Ch. 378.
Applied by C. A. EAST BARNET VALLEY URBAN COUNCIL v. STALLARD **[1909] 2 Ch. 555**

—— *Bunney* v. *Poyntz*, (1883) 4 B. & Ad. 568, is inconsistent with, if not expressly overruled by, *Gunn* v. *Bolckow, Vaughan & Co.*, (1875) L. R. 10 Ch. 491.
See In re J. DEFRIES & SONS, LIMITED **Warrington J. [1909] 2 Ch. 423**

—— *Burnham* v. *Bennett* – (1845) 2 Coll. 254
Considered and applied by Eve J. *In re* ILLINGWORTH – **[1909] 2 Ch. 297**

—— *Cadman* v. *Cadman*, (1886) 33 Ch. D. 397
Followed by Warrington J. *In re* HAMBROUGH'S ESTATE **[1909] 2 Ch. 620**

—— *Campbell* v. *Holyland*, (1877) 7 Ch. D. 166, 168.
Order in, followed by Warrington J. *In re* PARBOLA, LIMITED **[1909] 2 Ch. 437**

—— *Cave* v. *Cave* – (1856) 8 D. M. & G. 131
Considered and applied by Eve J. *In re* ILLINGWORTH – **[1909] 2 Ch. 297**

CASES—*continued.*

—— *Chesham (Lord), In re*, (1886) 31 Ch. D. 466
Adopted by C. A. *In re* LORD CHESHAM'S SETTLEMENT **[1909] 2 Ch. 329**

—— *Cohen* v. *Mitchell*, (1890) 25 Q. B. D. 262
Principle of, applied by Neville J. *In re* KENT COUNTY GAS LIGHT AND COKE COMPANY – **[1909] 2 Ch. 195**

—— *Cope* v. *Crossingham* – [1908] 2 Ch. 624
Affirmed by C. A. – **[1909] 2 Ch. 148**

—— *County Theatres and Hotels, Ld.* v. *Knowles*, [1902] 1 K. B. 480.
Followed by Warrington J. OCHS *v.* OCHS BROTHERS – **[1909] 2 Ch. 121**

—— *Crichton's Oil Co., In re*, [1902] 2 Ch. 86, 95.
Applied by Swinfen Eady J. *In re* ACCRINGTON CORPORATION STEAM TRAMWAYS COMPANY **[1909] 2 Ch. 40**

—— *Dale & Perry* v. *Lolley*, (1808) 2 Bro. C. C. 582, n.
Distinguished by Swinfen Eady J. ASCHERSON *v.* TREDEGAR DRY DOCK AND WHARF COMPANY **[1909] 2 Ch. 401**

—— *Dawson* v. *Braime's Tadcaster Breweries, Ld.*, [1907] 2 Ch. 359.
Followed by Warrington J. *In re* BENTLEY'S YORKSHIRE BREWERIES, LIMITED – – – **[1909] 2 Ch. 609**

—— *Ellis* v. *Ellis* – – [1905] 1 Ch. 613
Distinguished by Neville J. CRASTER *v.* THOMAS – – **[1909] 2 Ch. 348**

—— *Emslie* v. *Paterson*, (1897) 24 R. (Just. Cas.) 77.
Approved by C. A. BELLERBY *v.* HEYWORTH – – **[1909] 2 Ch. 23**

—— *Finch* v. *Great Western Ry. Co.*, (1879) 5 Ex. D. 254.
Distinguished by Swinfen Eady J. TAFF VALE RAILWAY COMPANY *v.* GORDON CANNING – **[1909] 2 Ch. 48**

—— *Gittins* v. *Steele* – (1818) 1 Swans. 199
Distinguished by Swinfen Eady J. *In re* WEST – – **[1909] 2 Ch. 180**

—— *Good, In re* – – – [1905] 2 Ch. 60
Followed by Warrington J. *In re* DONALD – – **[1909] 2 Ch. 410**

—— *Graham* v. *Wroughton*, [1901] 2 Ch. 451, 454.
Dictum of Byrne J. in, not followed by C. A. EAST BARNET VALLEY URBAN COUNCIL *v.* STALLARD **[1909] 2 Ch. 555**

—— *Gray* v. *Siggers* – (1880) 15 Ch. D. 74
Followed by Warrington J. *In re* NICHOLSON – – **[1909] 2 Ch. 111**

—— *Graysbrook* v. *Fox* – (1565) 1 Plowd. 275
Applied by Swinfen Eady J. *In re* WEST – – – **[1909] 2 Ch. 180**

—— *Great Northern Ry. Co.* v. *M'Alister*, [1897] 1 I. R. 587.
Applied by Swinfen Eady J. TAFF VALE RAILWAY COMPANY *v.* GORDON CANNING – – **[1909] 2 Ch. 48**

CASES—*continued.*

—— *Great Western Ry. Co.* v. *Talbot*, [1902] 2 Ch. 759.
Applied by Swinfen Eady J. TAFF VALE RAILWAY COMPANY *v.* GORDON CANNING – – [1909] 2 Ch. 48

—— *Gunn* v. *Bolckow, Vaughan & Co.*, (1875) L. R. 10 Ch. 491.
Referred to by Warrington J. *In re* J. DEFRIES & SONS, LIMITED [1909] 2 Ch. 423

—— *Hall* v. *Ewin* – (1887) 37 Ch. D. 74, 82
Dictum of Lopes L.J. in, queried by C. A. POWELL *v.* HEMSLEY [1909] 2 Ch. 252

—— *Hambro* v. *Burnand* – [1904] 2 K. B. 10
Distinguished by C. A. CUTHBERT *v.* ROBARTS, LUBBOCK & Co. [1909] 2 Ch. 226

—— *Hamilton, In re* – (1885) 31 Ch. D. 291
Followed by Warrington J. *In re* HAMBROUGH'S ESTATE [1909] 2 Ch. 620

—— *Henderson* v. *Arthur*, [1907] 1 K. B. 10, 11.
Dictum of Farwell J. in, followed by Warrington J. *In re* J. DEFRIES & SONS, LIMITED – [1909] 2 Ch. 423

—— *Howarth, In re* – (1873) L. R. 8 Ch. 415
Explained and distinguished by Warrington J. *In re* HAMBROUGH'S ESTATE – – [1909] 2 Ch. 620

—— *Howarth, In re. Howarth* v. *Makinson*, [1909] 1 Ch. 485.
Varied by C. A. – [1909] 2 Ch. 19

—— *Howe* v. *Dartmouth* (*Earl of*), (1802) 7 Ves. 137 a.
Discussed by Warrington J. *In re* NICHOLSON – – [1909] 2 Ch. 111

—— *Hughes-Hallett* v. *Indian Mammoth Gold Mines Co.*, (1882) 22 Ch. D. 561.
Distinguished by Swinfen Eady J. ASCHERSON *v.* TREDEGAR DRY DOCK AND WHARF COMPANY [1909] 2 Ch. 401

—— *Irrigation Company of France, In re*, (1871) L. R. 6 Ch. 176.
Distinguished by Eve J. THOMAS *v.* UNITED BUTTER COMPANIES OF FRANCE, LIMITED – [1909] 2 Ch. 484

—— *Jervis* v. *Wolferstan*, (1874) L. R. 18 Eq. 18, 26.
Distinguished by Swinfen Eady J. *In re* WEST – – [1909] 2 Ch. 180

—— *Leigh, In re* – (1888) 40 Ch. D. 290, 294
Dictum of Cotton L.J. in, applied by Warrington J. *In re* H.'S SETTLEMENT – – – [1909] 2 Ch. 260

—— *Leslie* v. *Leslie*, (1835) Ll. & G. t. Sugden, 1, 3.
Referred to by Warrington J. *In re* CHURCHILL – – [1909] 2 Ch. 431

—— *Mansfield* v. *Relf* – [1908] 1 K. B. 71
Discussed and distinguished by C. A. SALAMAN *v.* HOLFORD [1909] 2 Ch. 602

CASES—*continued.*

—— *Mathews* v. *Saurin*, (1893) 31 L. R. Ir. 181
Followed by Swinfen Eady J. ASCHERSON *v.* TREDEGAR DRY DOCK AND WHARF COMPANY – [1909] 2 Ch. 401

—— *Monypenny* v. *Dering*, (1852) 2 D. M. & G. 145.
Applied and followed by Eve J. *In re* NASH – – – [1909] 2 Ch. 450

—— *Morley, In re* – (1875) L. R. 20 Eq. 17
Applied by C. A. *In re* PETERSON [1909] 2 Ch. 388

—— *National Starch Company's Application, In re*, [1908] 2 Ch. 698.
Distinguished by Warrington J. *In re* CALIFORNIA FIG SYRUP COMPANY'S APPLICATION FOR A TRADE MARK [1909] 2 Ch. 99

—— *Nisbet* v. *Smith* – (1789) 2 Bro. C. C. 579
Followed by Swinfen Eady J. ASCHERSON *v.* TREDEGAR DRY DOCK AND WHARF COMPANY – [1909] 2 Ch. 401

—— *Oliver's Settlement, In re*, [1905] 1 Ch. 191
Followed by Eve J. *In re* NASH [1909] 2 Ch. 450

—— *Padwick* v. *Stanley* – (1852) 9 Hare, 627
Suggested limitation in, not followed by Swinfen Eady J. ASCHERSON *v.* TREDEGAR DRY DOCK AND WHARF COMPANY – – [1909] 2 Ch. 401

—— *Pearce* v. *Bullard, King & Co.*, [1908] 1 Ch. 780.
Overruled on one point by C. A. *In re* PEARCE – – – [1909] 2 Ch. 492

—— *Pett* v. *Fellows*, (1733) 1 Swans. 561, n., as explained by Sugden L.C. in *Leslie* v. *Leslie*, (1835) Ll. & G. t. Sugden, 1, 3.
Followed by Warrington J. *In re* CHURCHILL – – [1909] 2 Ch. 431

—— *Porter* v. *Baddeley* – (1877) 5 Ch. D. 542
Not followed by Warrington J. *In re* NICHOLSON – – [1909] 2 Ch. 111

—— *Powell* v. *Hemsley* – [1909] 1 Ch. 680
Affirmed by C. A. – [1909] 2 Ch. 352

—— *Ranelaugh* v. *Hayes* – (1683) 1 Vern. 189
Followed by Swinfen Eady J. ASCHERSON *v.* TREDEGAR DRY DOCK AND WHARF COMPANY – [1909] 2 Ch. 401

—— *Reg.* v. *Brown* – (1867) L. R. 2 Q. B. 630
Applied by Swinfen Eady J. TAFF VALE RAILWAY COMPANY *v.* GORDON CANNING – – [1909] 2 Ch. 48

—— *Rich* v. *Cockell* – (1802) 9 Ves. 369
Observations on, by Parker J. *In re* HARRIS – – – [1909] 2 Ch. 206

—— *Royal Worcester Corset Company's Application, In re*, [1909] 1 Ch. 459.
Distinguished by Warrington J. *In re* CALIFORNIA FIG SYRUP COMPANY'S APPLICATION FOR A TRADE MARK [1909] 2 Ch. 99

—— *Salaman* v. *Holford*– – [1909] 2 Ch. 64
Affirmed by C. A. [1909] 2 Ch. 602

CASES—*continued.*

—— *Saunders' Case* – (1599) 5 Rep. 12 a
Applied by Swinfen Eady J. *In re* WEST – – – [1909] **2 Ch. 180**

—— *Scrope* v. *Offley* (1736) 1 Bro. P. C. 276
Distinguished by Neville J. NOTTIDGE *v.* DERING – – [1909] **2 Ch. 647**

—— *Smith* v. *Humble* – (1854) 15 C. B. 321
Discussed and distinguished by C. A. SALAMAN *v.* HOLFORD
[1909] **2 Ch. 602**

—— *Smith* v. *Langford* – (1840) 2 Beav. 362
Can no longer be treated as a binding authority. Per Cozens-Hardy, M.R. *In re* SYKES – C. A. [1909] **2 Ch. 241**

—— *Stawell's Trusts, In re. Poole* v. *Riversdale*, [1909] 1 Ch. 534.
Reversed by C. A. – [1909] **2 Ch. 239**

—— *United Land Co.* v. *Great Eastern Ry. Co.*, (1875) L. R. 10 Ch. 586.
Distinguished by Swinfen Eady J. TAFF VALE RAILWAY COMPANY *v.* GORDON CANNING [1909] **2 Ch. 48**

—— *Watson* v. *Home* – (1827) 7 B. & C. 285
Discussed and distinguished by C. A. SALAMAN *v.* HOLFORD
[1909] **2 Ch. 602**

—— *Whitting* v. *Whitting*, (1908) 53 Sol. J. 100
Applied and followed by Eve J. *In re* NASH – – – [1909] **2 Ch. 450**

—— *Wooldridge* v. *Norris*, (1868) L. R. 6 Eq. 410.
Followed by Swinfen Eady J. ASCHERSON *v.* TREDEGAR DRY DOCK AND WHARF COMPANY
[1909] **2 Ch. 401**

CHARITY — *Friends, Society of—School—Trust for "civil or religious purposes"—Uncertainty—Scheme—Charitable Trust.*

Under the trusts of a deed relating to a school at L. the school premises and certain funds were settled upon educational trusts under the control of the Society of Friends, with an ultimate trust that, in case the subscribers to the school, or the Society of Friends assembling at L., determined that the school should be discontinued, the trustees should assure the trust estates and funds to such persons and "for such purposes, civil or religious," as the subscribers, or Friends assembling at L., should appoint. The deed also provided that the trustees should be members of the Society of Friends. At a duly constituted meeting of the Society of Friends and subscribers of the school a resolution was passed that the school should be discontinued, and the trust property be held for the general purposes of the Society of Friends assembling at L. There was evidence that the Society of Friends was a religious body, formed for the furtherance of religious life, and any civil purpose was subordinated to the religious element:—

Held, that the trust on the discontinuance of the school failed as a charitable trust and was void for uncertainty; and the trust premises must be held upon trust for educational purposes,

CHARITY—*continued.*

for which a scheme must be settled by the district registrar. *In re* THE FRIENDS' FREE SCHOOL. CLIBBORN *v.* O'BRIEN – **Eve J. 675**

2. —— *Proposed Scheme for Institute of Medical Sciences—Appeal to Public—Fund for Project — Voluntary Contributions—Legacy to Fund by Contributor—Subsequent Impossibility of Scheme — Abandonment—Return of Contributions—Charitable Intent—Cyprès—Failure of Legacy—Will—Construction.*

Testator bequeathed a legacy of 25,000*l.* to "The Institute of Medical Sciences Fund, University of London." The fund had been started by voluntary contributions in the testator's lifetime, with the object of carrying out a proposed scheme for the establishment of an Institute of Medical Sciences, and the testator himself had contributed largely to the fund. His executors paid the legacy to the trustees of the fund, but, subsequently, the scheme proved impracticable and was finally abandoned, and the various contributions were returned to the respective donors. On the question whether the legacy had been definitely devoted to a charitable purpose and ought to be administered cyprès:—

Held (affirming the decision of Joyce J.), that the legacy was a gift to take effect upon the happening of a condition which had failed; that there was no general charitable intent to be gathered from the will; and that the legacy must be repaid to the executors. *In re* UNIVERSITY OF LONDON MEDICAL SCIENCES INSTITUTE FUND. FOWLER *v.* ATTORNEY-GENERAL – – – – – **C. A. 1**

—— Volunteers, Yeomanry, and Militia, Gifts to—Territorial and Reserve Forces. *See* WILL. 7. **410**

CHEQUE—Company — Debentures — Interest—Cheques for, sent to trustees or by their direction to tenant for life—Non-presentation of cheque for payment – **423**
See COMPANY. 1.

CHILD.
See under INFANT.

CODICIL.
See under WILL.

COMMITTAL—Ward of Court—Jurisdiction—Marriage in contempt – – **260**
See WARD OF COURT.

COMPANY — *Debentures — Settlement of — Trustees registered Holders—Interest—Cheques for, sent to Trustees or by their Direction to Tenant for Life — Indorsement by Trustees — Negotiation — Non-presentation of Cheques for Payment — Claim for Interest by Trustees as Registered Holders.*

Under a settlement trustees held certain debentures in a company in respect of which they were registered as holders upon trust for D. for life and after her death for her children. Cheques for the interest on the debentures for the time being standing in the names of the trustees were drawn by the company sometimes in favour of S., a former trustee, and

COMPANY—*continued.*

sometimes in favour of D., as the interest became due. In the former case the cheques were indorsed by S. to D., and in the latter case they were sent by the company direct to her. The amount represented by the cheques was 1793*l.* 15*s.*, which included an amount for interest on 3000*l.* debentures, the principal money secured by which had been paid off. At the request of her son, who was the managing director of the company, D. had abstained from presenting the cheques for payment, and the interest on the debentures had not in fact been paid. A debenture-holders' action had been commenced against the company (which was now in liquidation), and the usual order for accounts and inquiries had been made. On taking the accounts the present trustees of the settlement claimed to rank by virtue of their debentures for the aggregate amount of the interest represented by the cheques:—

Held, that the mere giving of a cheque was not conditional payment of a secured debt so as to release the security.

Dictum of Farwell L.J. in *Henderson* v. *Arthur*, [1907] 1 K. B. 10, 13, followed.

Held, also, that the indorsement of the cheques by S. did not preclude the claimants from relying on their security.

Bunney v. *Poyntz*, (1833) 4 B. & Ad. 568, is inconsistent with, if not expressly overruled by, *Gunn* v. *Bolckow, Vaughan & Co.*, (1875) L. R. 10 Ch. 491.

Held, therefore, that the trustees were entitled to rank as secured creditors for the amount of the interest represented by the cheques. *In re* J. DEFRIES & SONS, LIMITED. EICHHOLZ *v.* J. DEFRIES & SONS, LIMITED

Warrington J. 423

2. —— *Preference Shares — Winding-up — Surplus Assets—Preference on Repayment of Capital—Right to further Share of Surplus—Distribution according to Nominal Value of Shares—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.*133, *sub-ss.* 1, 10—*Companies* (*Consolidation*) *Act*, 1908 (8 *Edw.* 7, *c.* 69), *s.* 186.

There is no general rule that where preference shareholders have a preference as to repayment of capital they can have no further share in surplus assets. The question depends on the construction of the memorandum and articles of association. But if these documents contain no provisions on the point, surplus assets must in a winding-up be divided amongst all the shareholders, ordinary and preference, in proportion to the nominal value of the shares.

A company incorporated in 1884 had an issued capital of 28,222 ordinary and 26,905 preference shares of 5*l.* each; the preference shares were entitled to a cumulative preferential dividend of 10 per cent. out of "the divisible profits of the company in each year," and "a preferential right to be repaid the amount paid up thereon and interest out of the assets of the company if the company should be wound up." The company never paid any dividend, except in the year 1905, when they paid 3 per cent. on the preference shares. In 1900 the capital of the company was reduced by writing down the

COMPANY—*continued.*

ordinary shares to 1*s.* per share. In 1908 the company's assets were sold for a sum sufficient to pay all their liabilities, repay the capital of both classes of shares, and leave a large surplus:—

Held, that the surplus was not divisible profits of the company and the preference shareholders were not entitled to have it applied in payment of their cumulative dividends; that they were entitled to have their capital repaid with interest at the rate of 5 per cent. per annum from the date of the winding-up order; and that the surplus, after paying to the ordinary shareholders their reduced capital of 1*s.* per share, must be divided among the preference and ordinary shareholders in proportion to the nominal value of their shares. *In re* ESPUELA LAND AND CATTLE COMPANY — **Swinfen Eady J. 187**

3. —— *Reconstruction—Shares partly paid up—Subscribing for Shares—Commission—Underwriting Agreement—Ultra vires—Companies* (*Consolidation*) *Act*, 1908 (8 *Edw.* 7, *c.* 69), *s.* 89.

In 1909 a limited company was formed having by its memorandum power to pay out of its funds all expenses incident to its formation and the issue of its capital, including commissions for underwriting shares, whether issued for cash or credited as partly paid; and clause 8 of its articles provided that the company might pay a commission at a rate of not exceeding 25 per cent. on the amount unpaid on any shares to any person in consideration of his subscribing or agreeing to subscribe for shares. The capital of the company was divided into shares of 5*s.* each.

The formation of this new company was part of a scheme for the reconstruction of an old company of the same name that was to go into liquidation for the purpose, and it was also part of the scheme that the liquidator should sell the undertaking of the old company (whose capital had been issued in shares of 5*s.* each) to the new company for a certain number of shares in the new company credited with 3*s.* 6*d.* paid up per share to be offered to the shareholders of the old company share for share. The new company, to ensure working capital and before contracting to purchase the undertaking of the old company, entered into an agreement with certain parties called "contractors," which recited the scheme and provided (clause 2) that, if the shareholders of the old company should not within a certain period apply for 400,000 shares in the new company credited with 3*s.* 6*d.* paid per share, the liquidator should endeavour to sell to other persons such of the 400,000 shares as should not be so applied for, and, if the liquidator should be unable to sell all the said shares within three days after the expiration of such period, the contractors would within three days thereafter (1.) purchase at a price to be agreed, not exceeding ½*d.* a share, so many of the said shares as should not be so applied for by the shareholders of the old company or sold by the liquidator; (2.) apply to the new company for an allotment of the same; (3.) pay the sum of 3*d.* per share on application for the same; and (clause 3) that when the whole of the 400,000 shares should

COMPANY—*continued.*

have been applied for by shareholders of the old company or by purchasers or by the contractors, and the moneys payable on application should have been received, then the liability of the contractors under clause 2 should cease, and the new company should thereupon pay the contractors "a sum equal to 10 per cent. upon 30,000*l.* the amount of the cash assessment on the said 400,000 shares." No prospectus of the new company had been issued offering any of its shares to the public for subscription. In an action to restrain the carrying out of the agreement as being ultra vires the new company :—

Held, that the agreement was a valid underwriting agreement within s. 89 of the Companies (Consolidation) Act, 1908. BARROW *v.* PARINGA MINES (1909), LIMITED
Neville J. 658.

4. —— *Reduction of Capital—Lost Capital—Evidence of Loss—Practice—Companies Act*, 1877 (40 & 41 *Vict. c.* 26), *s.* 3—*Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *s.* 46.

On a petition under the Companies (Consolidation) Act, 1908, for confirmation of a reduction of capital by cancelling paid-up capital which is lost or unrepresented by available assets evidence that the capital is lost or so unrepresented is not necessary. *In re* LOUISIANA AND SOUTHERN STATES REAL ESTATE AND MORTGAGE COMPANY – – **Neville J. 552**

5. —— *Waterworks — Statutory Powers—Incidental Powers—"Supply of Water" outside Statutory Limits — Ultra vires — Injunction — West Gloucestershire Water Act*, 1884 (47 & 48 *Vict. c. ccxlix.*), *ss.* 3, 4, 5, 6, 28, 34, 36, 56—*West Gloucestershire Water Act*, 1899 (62 & 63 *Vict. c. clviii.*), *ss.* 4, 12.

A water company authorized by their special Act to supply water to certain places, defined by the Act to be the limits of the Act, cannot supply water outside those limits, although not expressly forbidden by the Act to do so.

A water company, authorized by their special Acts to erect waterworks and supply water within certain limits which included the parish of A.. agreed to supply water to W., the owner of property in the adjoining parish of H., and accordingly extended their main in the parish of A. to the boundary where it adjoined the parish of H., and then, at the cost of W., laid a main some distance along a highway in the parish of H. and thence laid pipes to W.'s property :—

Held, that the water company, on the construction of their special Acts, were not by virtue either of any express or incidental powers entitled to supply water outside their statutory limits.

Held, also, that the water company were supplying water to W., not at the point where their mains reached the boundary in the parish of A., but at the terminals on W.'s property where he received and applied it to his use.

Held, therefore, that the water company were acting ultra vires, and an injunction was granted at the suit of the Attorney-General.

Decision of Neville J., [1909] 1 Ch. 636, affirmed. ATTORNEY-GENERAL *v.* WEST GLOUCESTERSHIRE WATER COMPANY
C. A. 338

COMPANY—*continued.*

6. —— *Winding-up — Parliamentary Company—Distribution of Assets—Preference Shares—Priority—Deficiency of Capital—Undistributed Profits—Undeclared Preferential Dividends—Companies Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 16), *s.* 120.

Apart from some special provision in that behalf, preference shares in a parliamentary company incorporated by a special Act that incorporates the Companies Clauses Acts have no priority as to capital.

Preference shareholders in such a parliamentary company have no right or claim to their fixed preferential dividends, cumulative or non-cumulative, unless and until declared under s. 120 of the Companies Clauses Consolidation Act, 1845.

Bond v. *Barrow Hæmatite Steel Co.*, [1902] 1 Ch. 353, 362, applied.

If the assets realized in a winding-up are insufficient to return the preference and ordinary capital in full, the preference shareholders cannot claim any arrears of undeclared preferential dividends out of undistributed profits, but the whole assets must be distributed rateably among all the shareholders in proportion to their capital.

In re Crichton's Oil Co., [1902] 2 Ch. 86, 95, applied. *In re* ACCRINGTON CORPORATION STEAM TRAMWAYS COMPANY
Swinfen Eady J. 40

7. —— *Winding-up—Sale to Foreign Company — "Company" — Meaning of — Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *ss.* 192, 285.

A sale to a foreign company cannot be effected under s. 192 of the Companies (Consolidation) Act, 1908.

In re Irrigation Co. of France, (1871) L. R. 6 Ch. 176, distinguished. THOMAS *v.* UNITED BUTTER COMPANIES OF FRANCE, LIMITED
Eve J. 484

—— Brewery company.
See under BREWERY COMPANY.

—— Canal company.
See under CANAL COMPANY.

—— Dentist — Registration under Companies Acts – – – – – – **524**
See DENTIST. 1.

—— Receiver in debenture-holders' action—Goods in possession of company under hire-purchase agreement—Interference with possession of receiver—Injunction—Proceedings in other Courts—Jurisdiction – – – – – **283**
See RECEIVER.

—— Shares—Specific legacy—Assent of executors—Transfer—Discovery of codicil—Recovery of shares – – – **180**
See PROBATE.

—— Tramway company.
See under TRAMWAY.

—— Will—Investment clause—Companies "in the United Kingdom" – – **548**
See WILL. 1.

COMPENSATION — Compulsory purchase — Street — Widening — Notice to treat—Withdrawal – – – – **287**
See LOCAL GOVERNMENT. 1.

—— Licensing Acts.
See under BREWERY COMPANY.

COMPULSORY PURCHASE—Street — Widening —Notice to treat—Withdrawal—Compensation – – – – – **287**
See LOCAL GOVERNMENT. 1.

CONFLICT OF LAWS—*Immovables—Contract relating to Foreign Land—Capacity to Contract—Lex Situs—Law of the Transvaal.*

The capacity of a person to enter into a contract relating to immovables is governed by the lex situs.

Therefore, where a married woman, whose domicil was English, by a deed executed in England, agreed to mortgage to a bank carrying on business in England and the Transvaal certain land belonging to her at Johannesburg, the title deeds of which were in the possession of the bank for safe custody, as security for past and future advances by the bank to her husband, but without incurring personal liability for the same, and appointed the bank manager at Johannesburg her attorney to mortgage and transfer this land, and to execute all necessary instruments for that purpose, and to appear before the Registrar of Deeds at Johannesburg and take all necessary steps for registering the same, and authorized her attorney to declare in her name that she renounced in favour of the bank the benefit of all rights which the law of the Transvaal, granted her in relation to the land in question and by virtue of two provisions of the Roman-Dutch law, which prevailed in the Transvaal, a married woman (subject to certain immaterial exceptions) was incapable of becoming surety for her husband unless she expressly renounced the benefit of each of these laws after having been informed of her rights thereunder :—

Held, that the question of her capacity to enter into this agreement was governed by the law of the Transvaal, consequently that the agreement was void for want of capacity, and that the bank were not entitled to retain the title deeds. BANK OF AFRICA, LIMITED *v.* COHEN – **C. A. 129**

CONTEMPT—Ward of Court — Marriage in contempt — Committal of ward — Jurisdiction – – – – – **260**
See WARD OF COURT.

CONTRACT—Foreign land, Contract relating to —Immovables—Capacity to contract—Lex situs – – – – – **129**
See CONFLICT OF LAWS.

—— Timber, Contract for purchase of, to be cut and removed by purchaser — Mutuality—Injunction – – **440**
See SPECIFIC PERFORMANCE.

CONTRIBUTORIES—Winding-up — Withdrawal of subscriptions—Liability in respect of withdrawals – – – – **526**
See INDUSTRIAL AND PROVIDENT SOCIETY.

CONVERSION—Absolute trust for—Investment clause—Companies "in the United Kingdom" – – – – **548**
See WILL. 1.

—— No trust for conversion—Wasting securities —Tenant for life and remainderman **111**
See WILL. 5.

COSTS—Counsel's fees—Three counsel—Scientific evidence—Special circumstances
See PRACTICE. **471**

—— Light Railway Order, Costs of obtaining—Costs—Taxation—Chancery or parliamentary scale – – – – **398**
See SOLICITOR. 2.

—— Mortgage—Application to be added as defendant and for extension of time for redemption—Form of order – **437**
See MORTGAGE. 2.

—— Solicitor.
See under SOLICITOR.

COVENANT — *Restrictive Covenant — Freehold Building Land—Plans to be submitted—Construction of Covenant—Lease by Covenantor—Breach of Covenant by Lessee—Bankruptcy of Lessee—Re-entry by Covenantor—Liability of Covenantor for his Assigns—Past Breach.*

The purchaser of part of a freehold building estate covenanted with the vendor for himself and his assigns to erect no other than private residences and to submit plans for approval before commencing to build. The purchaser granted a building lease with covenants similar to those in his conveyance ; the lessees, without submitting plans for the vendor's approval, commenced a building which was alleged to be and was held a breach of the covenant. The lessees became bankrupt, and their trustee having disclaimed the lease, the purchaser took possession of the land and offending building. The vendor having sold the rest of the estate to the plaintiff with the benefit of the purchaser's covenants, the plaintiff brought an action against the purchaser to compel removal of the building, and for damages :—

Held, that there was no continuing breach, the covenant having been broken once for all when the building was erected contrary to it ; that the breach was committed not by the purchaser, but by his lessees, and that he had not by his conduct rendered himself liable for the violation of the covenant ; and that neither at law nor in equity was the plaintiff entitled to any relief.

Decision of Eve J., [1909] 1 Ch. 680, affirmed.

Dictum of Lopes L.J. in *Hall* v. *Ewin*, (1887) 37 Ch. D. 74, 82, queried. POWELL *v.* HEMSLEY **C. A. 252**

—— Lessor's covenant to pay all present and future rates and taxes—Sub-letting at a profit—Increased assessment—Liability of lessor – – – – **602**
See LANDLORD AND TENANT.

—— Restrictive covenants—Building scheme—Rights of purchasers inter se—Benefit annexed to land—Assigns – **305**
See VENDOR AND PURCHASER. 1.

COVERTURE—Power—Appointment—"During coverture by will or deed"—Execution of will during coverture—Death of testatrix discovert—Exercise of power—Validity – – – – 297
See POWER.

CYPRÈS—Will—Charity—Proposed scheme for Institute of Medical Sciences—Failure of legacy – – – – 1
See CHARITY. 2.

DEATH—Accounts—Admissibility—Evidence—Entry of deceased person against interest – – – – – 382
See TRUSTEE.

—— Of member before winding-up—Liability of his estate – – – – 526
See INDUSTRIAL AND PROVIDENT SOCIETY.

DEBENTURE-HOLDERS—Company—Receiver
See RECEIVER. 283

DEBENTURES—Settlement of—Trustees registered holders—Interest – – 423
See COMPANY. 1.

DEDICATION—Highway.
See under HIGHWAY.

DENTIST—*Company—Registration under Companies Acts—Use of Word "Dentist"—Dentists Act*, 1878 (41 & 42 *Vict. c.* 33), *s.* 3—*Deceiving Public—Injunction.*

Though a limited company is not "a person" within the Dentists Act, 1878, the Court will restrain such a company from representing that they carry on the business of dentists in succession to a man who has been struck off the Dentists' Register for misconduct, or taking any name implying that they are registered under the Dentists Act, or are persons specially qualified to practise dentistry. ATTORNEY-GENERAL *v.* GEORGE C. SMITH, LIMITED
Swinfen Eady J. 524

2. —— *Unregistered Person—Description—"Specially qualified to practise dentistry"—Dentists Act*, 1878 (41 & 42 *Vict. c.* 33), *s.* 3.

By the Dentists Act, 1878, s. 3, "A person shall not be entitled to take or use the name or title of 'dentist' (either alone or in combination with any other word or words), or of 'dental practitioner,' or any name, title, addition, or description implying that he is registered under this Act or that he is a person specially qualified to practise dentistry, unless he is registered under this Act":—

Held, that the description forbidden by the section is a description of the person as distinguished from a description of the acts done by the person, and that the section does not prohibit an unregistered person from announcing that he does dental work provided that he does not say that he does so as a dentist or use any description of himself implying that he is specially qualified to practise as a dentist.

Therefore, where certain unregistered persons became partners in the business of the extraction and manipulation of teeth and two of the three partners affixed to the partnership premises a notice containing the names of the partners followed by the words "Finest Artificial Teeth. Painless Extraction. Advice Free":—

Held, that they had not committed an offence under s. 3 of the Act.

Whether the words "specially qualified" in s. 3 are limited to the statutory qualifications mentioned in s. 6 *quære.*

Barnes v. *Brown*, [1909] 1 K. B. 38, overruled.

The principle of *Emslie* v. *Paterson*, (1897) 24 R. (Just. Cas.) 77, approved. BELLERBY *v.* HEYWORTH – – – – C. A. 23

DEPOSITS—Tramways—Parliamentary deposits—Sale of undertaking before works completed – – – – 540
See TRAMWAYS.

DISENTAILING DEED—By way of mortgage—Infant—Maintenance—Tenant in tail in remainder—Order sanctioning mortgage of real estate—Jurisdiction of Court – – – – – 620
See INFANT.

—— Subject to anterior estates and powers annexed thereto—Portions—Mortgages—Priorities—Whether power released
See SETTLEMENT. 3. 647

DISTRIBUTION—"Eldest son"—Portions—Period of distribution postponed—Accelerating period of distribution—Younger son afterwards becoming eldest son – – – – – 239
See SETTLEMENT. 1.

DIVIDENDS—Company—Winding-up—Parliamentary company—Undeclared preferential dividends – – – 40
See COMPANY. 6.

DRAINS.
See under SEWERS.

EASEMENT—Level crossing—Agricultural land—Tennis club—Alteration of user 48
See RAILWAY.

—— Right of way.
See under WAY, RIGHT OF.

EDUCATION.
See under SCHOOL.

"**ELDEST SON**"—Accelerating period of distribution—Younger son afterwards becoming eldest son – – – 239
See SETTLEMENT. 1.

ELECTION — *Bequest by Married Woman of Husband's Property to a Third Person—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-s.* 1; *s.* 5.

If, having regard to the Married Women's Property Act, 1882, the will of a married woman would have passed property if it had been her

ELECTION —*continued.*

own at the date of the will, her husband is in respect of that property, if it belongs to him, even by acquisition in her right, and is clearly identified, put to election where the will also confers benefits on him.

Where the gift away from the husband is of all the wife's property of a certain description, it is more difficult to shew a case of election even where the wife has little or no property of that description.

Observations on *Rich* v. *Cockell*, (1802) 9 Ves. 369. *In re* HARRIS. LEACROFT *v.* HARRIS Parker J. 206

—— Appointment — Validity — Remoteness — "Possibility on a possibility"—Equitable interests – – – – 450
See SETTLEMENT. 2.

EQUITABLE EXECUTION.
See under EXECUTION.

EQUITABLE MORTGAGE.
See under MORTGAGE.

EVIDENCE — Accounts — Admissibility—Entry of deceased person against interest 382
See TRUSTEE.

—— Company — Reduction of capital — Lost capital—Evidence of loss – – 552
See COMPANY. 4.

—— Highway—Combined dedication—Acts of ownership—Admissibility of evidence
See HIGHWAY. 579

EXECUTION—Mortgage—Foreclosure order nisi —Creditor who has obtained equitable execution – – – – – 437
See MORTGAGE. 2.

—— Power of appointment—"During coverture by will or deed"—Execution of will during coverture — Death of testatrix discovert—Exercise of power—Validity
See POWER OF APPOINTMENT. 297

EXECUTOR—Probate—Revocation—Mesne acts of executors—Specific legacy—Bequest of shares to A.—Assent of executors—Transfer—Discovery of codicil—Shares given to B.—Recovery of shares – 180
See PROBATE.

——Will—Executors in England—Indian assets — Fraud in India — Revocation of Indian letters of administration—Title of executors – – – 348
See ADMINISTRATION.

FOOTWAY — New street — By-laws — Footway forming principal access to cottages—Width and construction 265
See LOCAL GOVERNMENT. 2.

FORECLOSURE—Mortgage.
See under MORTGAGE.

FOREIGN COMPANY — Sale to — Company—Winding-up—"Company," Meaning of.
See COMPANY. 7. 484

FOREIGN LAND—Contract relating to—Immovables—Capacity to contract—Lex situs – – – – – 129
See CONFLICT OF LAWS.

FORFEITURE — Will — Construction — "Deprived of the personal enjoyment of income or any part thereof" – 280
See WILL. 2.

FRAUD—Will—Executors in England—Indian assets—Revocation of Indian letters of administration—Title of executors 348
See ADMINISTRATION.

FRIENDS, SOCIETY OF — Charitable trust — School—Trust for "civil or religious purposes"—Uncertainty—Scheme 675
See CHARITY. 1.

GEOGRAPHICAL NAME — Trade mark — Registration – – – – 99
See TRADE MARK. 3.

GLOUCESTERSHIRE (WEST) WATER ACTS.
See under COMPANY.

GRANT— Letters of administration.
See under ADMINISTRATION.

GUARANTEE—Indemnity — Action quia timet —Joint and several guarantee of overdraft at bank—No demand by bank for payment – – – – – 401
See PRINCIPAL AND SURETY.

HEIRLOOMS—*Trust of Chattels as—Construction—To be enjoyed with Mansion House—Tenant in Tail—Vesting—Intention—Actual Possession.*

By a settlement of real estates made in 1877, plate, pictures, and chattels were assigned to trustees "upon trust to permit the same to be used, held, and enjoyed with the mansion house aforesaid by the person who for the time being shall be entitled to the said mansion house under the limitations thereof herein contained," yet so that for the effect of transmission they should not vest absolutely in any person thereby made tenant in tail male by purchase who should not attain the age of twenty-one years.

The eldest son attained twenty-one years, but died in the lifetime of the tenant for life. On the death of the tenant for life in 1907, the second son, an infant, claimed to be entitled to these heirlooms as tenant in tail male in possession:—

Held (reversing the decision of Eve J.), as a question of construction, that there was sufficient indication of intention on the part of the settlor that these heirlooms should go with the mansion house and vest only in a tenant in tail male in possession, and, consequently, that they vested in the second son, though liable to be divested in the event of his dying under twenty-one.

Construction put upon this clause by Chitty J. in *In re Lord Chesham*, (1886) 31 Ch. D. 466, adopted. *In re* LORD CHESHAM'S SETTLEMENT. VISCOUNT VALENTIA *v.* LADY CHESHAM C. A. 329

HIGHWAY—*Dedication — Presumption — Strip of Land running alongside Highway—Disused Tramway — Railway Company — Capacity to Dedicate—Adjoining Owner—Right of Pre-emption—Combined Dedication—Admissibility of Evidence—Acts of Ownership.*

A strip of land running alongside a high-road and forming the site of a tramway, the user of which as such had been discontinued, was vested in a railway company, with power for the company at any time to use the strip for the purpose of their undertaking or to sell it, subject in the latter event to a right of pre-emption in the adjoining owners :—

Held, that the strip of land was capable of being dedicated by the company to highway uses, and that the company, so long as they did nothing incompatible with their statutory objects, were in a position to dedicate it for the purposes of a public right of way along it, and were not incapacitated from so doing by the right of pre-emption vested in the adjoining owners :—

Held, further, upon the evidence of public user, that dedication of the land in question must be presumed.

On an inquiry whether part of a continuous strip of land has been dedicated to highway purposes, evidence that portions of the strip at each end of the part in dispute have been enclosed to the knowledge of, or without interference from, the highway authority is not admissible.

In appreciating the true effect of acts of ownership as rebutting an intention to dedicate, it is important to observe whether they are referable to the ownership of the soil rather than to any intention to exclude the passage of the public. In the former case they may tend to confirm the owner's general acquiescence in the continuous user of the surface by the public for highway purposes.

When an owner, alive to the necessity of evidencing his continued possession by periodical perambulations, and active in preventing encroachment upon or interference with his soil and in warning off trespassing wayfarers from parts of his land, at the same time permits, without protest or interference, the unrestricted passage of the public over the surface of the very soil of which he is asserting his ownership, there are cogent grounds for attributing to the public user an origin which, as against the owner of the soil, has established public rights. COATS *v.* HEREFORDSHIRE COUNTY COUNCIL– **C. A. 579**

—— Repair of private or occupation roads—Dedication as highway – – **361**
See INCLOSURE ACT.

HUSBAND AND WIFE—*Purchase of House—Joint Tenancy — Purchase-money paid by Husband — Resulting Trust — Advancement — Rebuttal—Decree of Nullity of Marriage.*

In 1896 the plaintiff, then Miss W., was married to the defendant. In 1897 the defendant bought a house for 654*l.*, which was conveyed to him and his wife as joint tenants. The defendant paid 354*l.* out of his own money and borrowed the remaining 300*l.* on the security of a mortgage of the house. This mortgage was executed by both husband and wife and was in the ordinary form of a mortgage by joint tenants. In 1898 the plaintiff and defendant separated. In 1905 the defendant paid off the 300*l.* mortgage debt, and the house was reconveyed to him and the plaintiff. In 1907 the plaintiff instituted proceedings for a declaration of nullity of marriage, and in October, 1908, a decree absolute was made whereby the marriage was declared "to have been and to be absolutely null and void." The plaintiff brought this action for a declaration that she was entitled to the house as joint tenant in fee with her late husband :—

Held, that at the date of the purchase the husband intended the house to be an advancement for the wife ; that there was no implied condition that the marriage should continue ; and that the plaintiff was entitled to the declaration she claimed. DUNBAR *v.* DUNBAR **Warrington J. 639**

—— Will — Election — Bequest by married woman of husband's property to a third person – – – – – **206**
See ELECTION.

IMMOVABLES—Contract relating to foreign land — Capacity to contract — Lex situs– – – – – – **129**
See CONFLICT OF LAWS.

INCLOSURE—Of common land—Award of right of way—Non-user—User of other road on servient tenement—Presumption of lost grant—Prescription – – **570**
See WAY, RIGHT OF.

INCLOSURE ACT—*Repair of Private or Occupation Roads—Dedication as Highway—Highway Act*, 1835 (5 & 6 *Will.* 4, *c.* 50), *s.* 23—*Inclosure Act*, 1845 (8 & 9 *Vict. c.* 118), *s.* 68.

A valuer who makes an award under the Inclosure Act, 1845, has a discretion in each case as to the amount of formation and completion of private or occupation roads and ways set out by him in his award. The liability under s. 68 of the Act to maintain and keep repaired the private or occupation roads and ways arises after they have been formed and completed and is confined to the extent to which they have been formed and made up.

The valuer may, where it is necessary, set out footways to accommodate enclosed lands or adjoining owners.

Observations as to the effect of s. 23 of the Highway Act, 1835, with reference to private or occupation roads or ways set out under the Inclosure Act, 1845. REYNOLDS *v.* BARNES **Parker J. 361**

INCOME—Will—Annuity—Charge on income or capital – – – – – **19**
See ANNUITY.

INDEMNITY—Action quia timet—Present debt —No demand by bank for payment—Parties – – – – – **401**
See PRINCIPAL AND SURETY.

INDIAN SUCCESSION ACT, 1865 — Will — Executors in England—Indian assets
See ADMINISTRATION. **348**

INDUSTRIAL AND PROVIDENT SOCIETY—*Winding-up — Contributories — Withdrawal of Subscriptions—Liability in respect of Withdrawals—Death of Member before Winding-up —Liability of his Estate—Industrial and Provident Societies Act*, 1893 (56 & 57 *Vict. c.* 39), *ss.* 10, 34, 58, 60; *Sched. II., clauses* 7, 9.

The rules of a society registered under the Provident and Industrial Societies Acts provided that its capital should be raised by shares of 5*l.* each; that the subscription should be not less than 2*s.* 6*d.* on each share per month, but that a member should not be bound to pay any subscription after the first, unless required by the directors; and that a member might withdraw all or any part of his subscriptions. They also provided that a member whose interest in the society was less than 100*l.* might nominate persons to whom his shares were to be paid on his death, but in default of such nomination, or if a member whose interest exceeded 100*l.* should die, his interest was to be payable or transferable only to his executors. Certain members had paid up the subscriptions on their shares in full, and then withdrawn part, and in some cases afterwards paid up part of the subscriptions so withdrawn. All these transactions were entered in the pass-books of members and the books of the company as payments and withdrawals on account of their shares. Some members had subscribed for one share only in order to obtain an advance and paid the first subscription of 2*s.* 6*d.* and had repaid the whole of the advance, but had not formally withdrawn their shares or obtained repayment of the 2*s.* 6*d.* Other members had died, having at the date of their death some subscriptions to their credit in respect of shares, and their executors had not withdrawn the whole. The society was being wound up compulsorily.

The Industrial and Provident Societies Act, 1893, requires that the rules should make provisions as to withdrawal of shares and provides that a member shall cease to be a member on withdrawal:—

Held, (1.) that so long as a member left any subscriptions standing to his credit in respect of shares he was liable to pay, on calls made by the directors, or in a winding-up, the difference between the amount so standing to his credit and the nominal amount of the shares, including subscriptions which he had paid up and then withdrawn; (2.) that the liability of a member was not terminated by his death: in this respect societies under this Act are to be distinguished from building societies; (3.) that the advanced members were liable for the difference between the 5*l.* nominal amount of their share and the 2*s.* 6*d.* paid notwithstanding that they had repaid their advances. *In re* UNITED SERVICE SHARE PURCHASE SOCIETY, LIMITED
Neville J. 526

INFANT — *Maintenance — Tenant in Tail in Remainder—Order sanctioning Mortgage of Real Estate—Remaindermen not Parties—Jurisdiction of Court—Disentailing Deed by way of Mortgage—Trustee Act*, 1893 (56 & 57 *Vict. c.* 53), *ss.* 30, 33.

The Court has no jurisdiction to authorize a mortgage of the interest of an infant tenant in tail in remainder for the purpose of raising money for his maintenance.

In re Hamilton, (1885) 31 Ch. D. 291, and *Cadman* v. *Cadman*, (1886) 33 Ch. D. 397, followed.

In re Howarth, (1873) L. R. 8 Ch. 415, explained and distinguished.

Where, therefore, in an action, to which none of the remaindermen were parties, the Court by a first order directed trustees to raise money for the maintenance of an infant tenant in tail in remainder by means of a mortgage of his interest in the settled estate, and by a second order the Court declared that the infant was a trustee of his interest directed to be mortgaged within the meaning of s. 30 of the Trustee Act, 1893, and directed certain persons to convey that interest by way of mortgage to secure the money, and in pursuance of the second order a disentailing deed by way of mortgage was executed:—

Held, that the orders were made per incuriam and without jurisdiction, and were therefore of no effect.

Held, also, that the first order, being made without jurisdiction, was not an order directing a mortgage within the meaning of s. 30 of the Trustee Act, 1893, and that the second order, being founded on the first, was equally made without jurisdiction, and the provisions of the Trustee Act, 1893, could not support it.

Held, therefore, that, notwithstanding the orders and the mortgage, the land remained limited to the original uses of the settlement. *In re* HAMBROUGH'S ESTATE. HAMBROUGH *v.* HAMBROUGH — — **Warrington J. 620**

INFANT—*continued.*

INJUNCTION—Dentist—Use of word "dentist"—Deceiving public — — — **524**
See DENTIST. 1.

—— Receiver, Interference with possession of—Proceedings in other Courts—Jurisdiction — — — — — — **283**
See RECEIVER.

—— Timber, Contract for purchase of, to be cut and removed by purchaser—Mutuality
See SPECIFIC PERFORMANCE. **440**

—— Trade union.
See under TRADE UNION.

—— Water from river, Diversion of — Canal company—Statutory powers — **505**
See CANAL COMPANY.

—— Waterworks—Statutory powers—Supplying water outside statutory limit—Ultra vires — — — — — **338**
See COMPANY. 5.

INSURANCE (LIFE) — Bankruptcy — Life policies—Payment of premiums from date of receiving order — Salvage — Interest — — — — — **492**
See BANKRUPTCY. 1.

INTEREST—Debentures—Claim for interest by trustees as registered holders — **423**
See COMPANY. 1.

INTEREST—*continued.*

—— Legacy payable at twenty-one—Interest—General intention to provide maintenance – – – – – 431
See WILL. 3.

—— Life policies—Payment of premiums from date of receiving order — Salvage — Interest – – – – – 492
See BANKRUPTCY. 1.

INVESTMENT — Will — Companies "in the United Kingdom"—Companies registered in England but operating abroad 548
See WILL. 1.

ISSUE — Will — Construction — Gift to issue "according to the parent stock"—Per stirpes – – – – – 36
See WILL. 4.

JOINT TENANCY — Husband and wife—Purchase of house—Purchase-money paid by husband—Resulting trust—Advancement—Rebuttal—Decree of nullity of marriage – – – – – 639
See HUSBAND AND WIFE.

JURISDICTION—Infant—Maintenance—Tenant in tail in remainder—Order sanctioning mortgage of real estate—Jurisdiction of Court – – – – – 620
See INFANT.

—— Receiver—Interference with possession of receiver — Injunction — Proceedings in other Courts – – – – 283
See RECEIVER.

—— Ward of Court—Marriage in contempt—Committal of ward – – – 260
See WARD OF COURT.

LACHES—Action by Attorney-General—Mandatory injunction—Delay – – 505
See CANAL COMPANY.

"**LAND**"—Advowson in gross — Foreclosure—Stale demand – – – – 519
See MORTGAGE. 1.

LANDLORD AND TENANT—*Lease at a Rack Rent—Lessor's Covenant to pay all present and future Rates and Taxes—Sub-letting at a Profit—Increased Assessment—Liability of Lessor.*

Where, in a lease of premises at a rack rent, the lessor covenanted to pay all rates and taxes "now payable or hereafter to become payable in respect of the premises":—

Held, that the lessor's liability under his covenant was not limited to the assessment existing at the date of the lease, but extended to an increased assessment.

Watson v. *Home*, (1827) 7 B. & C. 285; *Smith* v. *Humble*, (1854) 15 C. B. 321; and *Mansfield* v. *Relf*, [1908] 1 K. B. 71, discussed and distinguished.

Decision of Neville J., [1909] 2 Ch. 64, affirmed. SALAMAN *v.* HOLFORD – C. A. 602

LEASE.
See under LANDLORD AND TENANT.

LEASE—*continued.*

—— Restrictive covenant — Building land — Plans to be submitted—Bankruptcy of lessee—Liability of covenantor for his assigns—Past breach – – – 252
See COVENANT.

LEGACY.
See under WILL.

LETTERS OF ADMINISTRATION.
See under ADMINISTRATION.

LEVEL CROSSING—Railway – – – 48
See RAILWAY.

LEX SITUS—Immovables—Contract relating to foreign land—Capacity to contract—Law of the Transvaal – – – 129
See CONFLICT OF LAWS.

LICENSING ACTS—Brewery company—Debenture trust deed—Mortgaged licensed premises — Compensation — "Capital moneys"—"Purchase-moneys" – 609
See BREWERY COMPANY.

LIEN—Banker's lien — Stockbroker—Authority to borrow—Pledge of client's security—Overdraft—Special borrowing – 226
See BANK.

—— Vendor's lien—Shares in ships—Bankruptcy—Proof – – – – – 492
See BANKRUPTCY. 1.

LIFE INSURANCE.
See under INSURANCE (LIFE).

LIGHT RAILWAYS.
See under RAILWAY.

LIMITATIONS, STATUTE OF—Innocent breach of trust—Misappropriation by solicitor—Acknowledgment—Payment of interest to tenant for life – – – 382
See TRUSTEE.

—— Solicitor—Bill of costs—Taxation—Submission to pay—Items barred by Statute of Limitations – – – – 170
See SOLICITOR. 1.

LOCAL AUTHORITY—Sewers.
See under SEWERS.

LOCAL GOVERNMENT — *Compulsory Purchase—Street — Widening — Notice to Treat — Withdrawal — Compensation — Michael Angelo Taylor's Act*, 1817 (57 *Geo.* 3, *c. xxix.*), *s.* 80.

The service of a notice to treat by a local authority upon a landowner, under the compulsory powers of Michael Angelo Taylor's Act, in order to acquire property for the purpose of widening a street, does, for some purposes, create the relationship of vendor and purchaser between the parties; and one of the consequences which follow from such relationship is that the subject-matter of the contract is thereby settled. The landowner must either treat the notice as a contract to purchase the lands as a whole or repudiate it; he cannot accept it in part and repudiate it in part.

Where a landowner has repudiated the validity

LOCAL GOVERNMENT—*continued.*

of a notice to treat, the local authority giving the notice is entitled to withdraw it altogether, and cannot be compelled to proceed with that part of it which is acceptable to the landowner.

In such a case no compensation by way of damages will be given to the landowner. WILD *v.* WOOLWICH BOROUGH COUNCIL **Eve J. 287**

2. —— *Street—New Street—By-laws—Footway forming principal Access to Cottages—Width and Construction—Public Health Act*, 1875 (38 *&* 39 *Vict. c.* 55), *ss.* 4, 157.

In making by-laws, and insisting on their observance, a local authority is entitled to consider what may happen in the future, when present conditions have been altered and the neighbourhood has developed, even although the present necessity for the by-laws may not be obvious.

The power to make by-laws, as regards new streets, given by s. 157 of the Public Health Act, 1875, is not confined to streets in the popular sense of the term, namely, roadways with houses on both sides of them, but applies to streets, as defined by s. 4 of the Act, which are proposed to be laid out and constructed for the first time.

The by-laws of an urban sanitary authority required every new street over 100 ft. long to be so laid out that its width should be 36 ft. at the least, and that it should be constructed for use as a carriage drive.

W., who was employed, as a builder, by G., the owner of land, to erect some cottages on the land of G., sent to the urban authority plans shewing an intended footpath, 202 ft. long and 5 ft. wide, affording the principal access to the cottages. The proposed footpath being objected to as not complying with the by-laws, W., without any authority from G., undertook that a roadway, 36 ft. wide, should be made as soon as possession of sufficient land on the side further from the cottages to enable a road of the required width to be made could be obtained from a tenant whose tenancy could not be determined for some months. The plans, varied so as to shew a roadway 36 ft. wide, were approved on the conditions of the undertaking. The cottages were then erected, and the footpath was levelled and surfaced with rubble and sand. It was 5 ft. wide and bounded on the further side from the cottages by an ancient hedge, and on the nearer side by a fence in which were openings giving access to the cottages :—

Held, that the defendants had laid out and constructed a street within the meaning of the by-laws ; that the by-laws were intra vires and reasonable ; and that, although W., by reason of his having no control over the land, was not a proper party to the action, an injunction to enforce the obligations under the by-laws must be granted against G. ATTORNEY-GENERAL *v.* GIBB – – – – – **Parker J. 265**

LONDON—*Water Rate—Trade Premises—Sanitary Conveniences — "Domestic Purposes" — Waterworks Clauses Act*, 1863 (26 *&* 27 *Vict. c.* 93), *s.* 12—*Metropolitan Water Board (Charges) Act*, 1907 (7 *Edw.* 7, *c. clxxi.*), *ss.* 8, 9, 13, 16, 25.

LONDON—*continued.*

The Metropolitan Water Board (Charges) Act, 1907, s. 8, provides for a supply of water for "domestic purposes" to any house or building within the limits of supply of the Board at a rate based on the annual rateable value of the house or building ; ss. 9 and 13 prescribe the machinery for ascertaining such rate ; s. 16 provides for a supply of water to any premises by meter when required for "purposes other than domestic" at rates varying with the quantity supplied ; and s. 25 defines "domestic purposes" to include water closets and baths of a certain capacity, but not to include "a supply of water for . . . . any trade manufacture or business."

A gas company, whose works were within the limits of supply of the Board, provided at their works in pursuance of their statutory obligations under the Factory and Workshop Act, 1901, all necessary sanitary conveniences for their workmen. No one resided at the works, which were exempt from inhabited house duty. The company claimed to be entitled under s. 16 of the Act of 1907 to a supply of water by meter for the sanitary conveniences on the ground that such supply was "for purposes other than domestic," i.e., for trade purposes, and that their works were within the exception of "any trade manufacture or business" in s. 25 of the Act :—

Held, that the question was not the character of the premises, but the character of the purposes for which the water was used ; that the supply in question was for domestic purposes ; and, therefore, that the company were not entitled to a supply under s. 16, but were entitled to a supply under ss. 8, 9, and 13 of the Act. SOUTH SUBURBAN GAS COMPANY *v.* METROPOLITAN WATER BOARD – – – **Neville J. 666**

MAINTENANCE—Infant.
See under INFANT.

—— Will — Legacy payable at twenty-one — General intention to provide maintenance – – – – – **431**
See WILL. 3.

MANDATORY INJUNCTION—Canal company — Diversion of water from river — Statutory powers – – – **505**
See CANAL COMPANY.

MANSION HOUSE—Heirlooms—Trust of chattels as—Construction—To be enjoyed with mansion house—Tenant in tail—Vesting—Actual possession – – – **329**
See HEIRLOOMS.

MARRIAGE—Ward of Court—Marriage in contempt—Committal of ward—Jurisdiction – – – – – – **260**
See WARD OF COURT.

MARRIED WOMAN.
See under HUSBAND AND WIFE.

MEDICAL SCIENCES — Proposed scheme for Institute of—Will—Charitable intent—Cyprès—Failure of legacy – – **1**
See CHARITY. 2.

METROPOLIS.
See under LONDON.

METROPOLITAN WATER BOARD (CHARGES) ACT, 1907 - - - - 666
See LONDON.

MICHAEL ANGELO TAYLOR'S ACT - 287
See LOCAL GOVERNMENT. 1.

MILITIA (VOLUNTEERS, YEOMANRY, AND) —Will—Construction - - 410
See WILL. 7.

MISAPPROPRIATION—By solicitor—Innocent breach of trust—Limitations, Statute of—Acknowledgment - - 382
See TRUSTEE.

MORTGAGE—*Foreclosure—Advowson in Gross—Equitable Mortgage—No Payment of Principal or Interest for forty-eight Years—Stale Demand—"Land"—Real Property Limitation Act*, 1833 (3 & 4 *Will.* 4, *c.* 27), *s.* 1.

The plaintiffs sought foreclosure of an equitable mortgage of an advowson in gross. The mortgage was created by deed in 1860, accompanied by deposit of the title deeds. No claim for, or payment of, principal or interest had ever been made, and no acknowledgment ever given. The plaintiffs were assigns of the original mortgagees, but the express power of sale did not extend to assigns. The defendant had been the incumbent of the living since 1865, and in 1892 had bought the advowson, with notice of the mortgage, from the official receiver in bankruptcy of the original mortgagor.

An advowson is not "land" within the meaning of that term as used in the Real Property Limitation Act, 1833.

Held, that the equitable doctrine of staleness of demand applied, and that the plaintiffs' claim failed. BROOKS *v.* MUCKLESTON
Joyce J. 519

2. —— *Foreclosure Order nisi—Creditor who has obtained equitable Execution—Application to be added as Defendant and for Extension of Time for Redemption—Costs—Form of Order—Mortgagor and Mortgagee—Practice.*

Where in a foreclosure action a mortgagee had obtained a foreclosure order nisi, and subsequently a judgment creditor in another action, who had obtained the appointment of a receiver by way of equitable execution of the property of the mortgagor, applied to be added as a defendant to the foreclosure action, and that the period for redemption might be extended, the Court made an order adding the applicant as defendant, but refused to extend the period for redemption.

Order in *Campbell* v. *Holyland*, (1877) 7 Ch. D. 166, 168, followed. *In re* PARBOLA, LIMITED. BLACKBURN *v.* PARBOLA, LIMITED
Warrington J. 437

—— Bankruptcy—Secured creditors—Separate securities—Proof—Lumping debts and securities - - - - - 492
See BANKRUPTCY. 1.

MORTGAGE—*continued.*

—— Infant — Maintenance — Tenant in tail in remainder—Order sanctioning mortgage of real estate—Jurisdiction of Court - - - - - 620
See INFANT.

—— Settlement—Portions — Disentailing deed subject to anterior estates and powers annexed thereto—Mortgages—Priorities
See SETTLEMENT. 3. 647

NOTICE — Compulsory purchase — Street — Widening — Notice to treat — Withdrawal—Compensation - - 287
See LOCAL GOVERNMENT. 1.

—— Purchaser for value without notice — Revocation of Indian letters of administration—Title of executors - 348
See ADMINISTRATION.

OWNERSHIP — Highway — Dedication — Presumption—Disused tramway—Railway company—Acts of ownership - 579
See HIGHWAY.

PARLIAMENTARY DEPOSITS AND BONDS ACT, 1892 - - - - 540
See TRAMWAYS.

PARTIES — Indemnity — Action quia timet — Present debt—No demand by bank for payment - - - - - 401
See PRINCIPAL AND SURETY.

PARTNERSHIP — Undischarged bankrupts — After-acquired property — Purchase of real estate as partners—Sale to a company — Intervention of trustees in bankruptcy - - - - 195
See BANKRUPTCY. 2.

PATENT — *Prolongation — Extension of Term — Jurisdiction to grant Second Extension — Patents and Designs Act*, 1907 (7 *Edw.* 7, *c.* 29), *s.* 18.

When a patent has once been extended for a further term the power given by s. 18 of the Patents and Designs Act, 1907, is exhausted, and the Court has no jurisdiction to grant a second extension. *In re* THOMPSON'S PATENT
Parker J. 447

2. —— *Revocation — Patented Article or Process manufactured or carried on exclusively or mainly out of the United Kingdom—Failure in United Kingdom—Patents and Designs Act*, 1907 (7 *Edw.* 7, *c.* 29), *ss.* 24, 27.

If a patentee proves that he has done his best to fulfil the obligations arising under the Patents and Designs Act, 1907, by establishing in this country an industry in the patented article, and that his want of success has been due to circumstances beyond his control and not to the manner in which he has exercised the rights conferred upon him by his patent, the patent ought not to be revoked. *In re* BREMER'S PATENT; *Ex parte* BRAULIK. *In re* HÖGNER'S PATENT; *Ex parte* BRAULIK - **Parker J. 217**

PATENT—*continued.*

3. —— *Revocation — Patented Article or Process manufactured or carried on exclusively or mainly out of United Kingdom—Patents and Designs Act*, 1907 (7 *Edw.* 7, *c.* 29), *ss.* 24, 27.

Sect. 24 of the Patents and Designs Act, 1907, deals primarily with cases where the trade of this country has been injured by an abuse of the monopoly conferred by the patent, irrespective of anything which is being done abroad, while s. 27 deals primarily with cases where the object or effect of the use of such rights in the way they have been used has been to favour the development of industries abroad at the expense of industries in the United Kingdom.

The keynote of s. 27 is forfeiture of the patent for the abuse of the monopoly at the instance of a common informer, and any one, whether a foreign or a British subject, and whatever his motive, can, by satisfying the Comptroller of the existence of the circumstances contemplated in sub-s. 1, throw on the patentee the onus of proving, to prevent revocation, that the patented process or article is carried on or manufactured to an adequate extent within the United Kingdom, or of giving a satisfactory reason why it is not so carried on or manufactured.

Sect. 27 does not mean that in every case where more than 50 per cent. of the patented articles manufactured anywhere are made abroad the patentee can be called upon to defend his patent rights; if the article is manufactured in the United Kingdom to as great an extent as can reasonably be expected, having regard to the industrial development of other countries, no presumption against the patentee arises.

Sect. 27, sub-s. 1, institutes a comparison between the extent to which the article or process is manufactured or carried on in this country and the extent to which it is manufactured or carried on abroad, whether the articles are or are not imported into this country, and the section is meant to hit every abuse of the patentee's monopoly the object or result of which is to benefit foreigners at the expense of traders within the United Kingdom.

In determining whether there has been "adequate" manufacturing in the United Kingdom, or whether "satisfactory reasons" for the inadequacy are given by the patentee, it is left to the Comptroller, subject to appeal to the Court, to determine in each case, and having regard to all the circumstances, whether the home manufacture is adequate, or, if not, whether the reasons are satisfactory, he bearing in mind (*a*) that the manufacture is not adequate if it is lessened by the patentee exercising his patent rights to the hurt of British industry—e.g., by giving foreign traders a preference as to licences or otherwise over British traders—and (*b*) that reasons are not satisfactory which do not account for the inadequacy of the home manufacture by causes operating irrespective of any abuse of the monopoly.

On the other hand, a patentee who has allowed part of the demand in this country to be supplied by the importation of goods from abroad has not necessarily precluded himself from proving that there is adequate home manufacture or giving satisfactory reasons for the inadequacy of that manufacture, the policy of s. 27 being to secure fair play between foreign and British industries.

Statement of matters which may be considered in determining whether home manufacture is adequate, and what are satisfactory reasons for the inadequacy of that manufacture.

Sect. 27 applies both to patents in existence before the Act of 1907 and patents subsequently granted, although reasons might be accepted as satisfactory in the case of the former which would not be so accepted in the latter; but the fact that a patentee has before the Act precluded himself by licence or contract from working his patent in this country is not a satisfactory reason.

Observations on the then existing rules of procedure as to applications for the revocation of patents.

In 1900 two patents were granted to H. for inventions relating to a process of manufacturing imitation stone slabs. The invention was in commercial operation in Germany, France, and Belgium, but was never worked in the United Kingdom. The patentee devoted himself to the establishment abroad of industries in which the patented process was carried on, and used his monopoly to secure to a Belgian company, to whom in 1905 he granted an exclusive licence for the United Kingdom, the monopoly of selling in the United Kingdom articles manufactured by the company in Belgium :—

Held, affirming the Comptroller, that the patent ought to be revoked forthwith, although in July, 1908, the patentee and the Belgian company had issued newspaper advertisements in the United Kingdom expressing their willingness to sell or enter into working arrangements for the manufacture of goods in the United Kingdom under the patented process. *In re* HATSCHEK'S PATENTS. *Ex parte* ZERENNER - **Parker J. 68**

PAYMENT—Trade union—Branch—Secession—Threatened distribution of funds—Ultra vires — Action by head trustees for injunction and payment over of branch funds - - - - - **148**
See TRADE UNION.

PER STIRPES — Will — Construction — Gift to issue "according to the parent stock" *See* WILL. 4. **36**

PLANS—Restrictive covenant — Building land —Plans to be submitted—Bankruptcy of lessee — Re-entry by covenantor — Liability of covenantor for his assigns —Past breach - - - - **252**
See COVENANT.

PLEDGE—Banker's lien—Stockbroker—Authority to borrow — Pledge of client's security—Overdraft — Special borrowing - - - - - - **226**
See BANK.

PORTIONS — Settlement — Disentailing deed — Mortgages—Priorities—Whether power released - - - - - **647**
See SETTLEMENT. 3.

POSSESSION—Heirlooms—Trust of chattels as —Construction—To be enjoyed with mansion house—Tenant in tail—Vesting —Actual possession – – – **329**
See HEIRLOOMS.

"POSSIBILITY ON A POSSIBILITY"—Equitable interests—Election – – **450**
See SETTLEMENT. 2.

POWER OF APPOINTMENT—*Appointment—"During coverture by will or deed"—Execution of Will during Coverture—Death of Testatrix discovert—Exercise of Power—Validity.*

By a marriage settlement, made in 1878, the trustees were to hold the trust funds upon trust, after the death of the wife, for such persons as she should "during coverture by will or deed appoint," and in default of appointment, then in trust for her statutory next of kin. By her will, made in 1884, in the lifetime of her husband, she appointed the settled funds to her five brothers and sisters in equal shares as tenants in common. The husband died in 1886. In 1898 the widow made a codicil to her will, appointing the plaintiffs to be executors of her will and in other respects confirming her will. She died in 1908, discovert:—

Held, that the execution by the lady of her will, while under coverture, operated as a good exercise of the power of testamentaty appointment contained in the settlement, notwithstanding that she died discovert.

Burnham v. *Bennett*, (1845) 2 Coll. 254, and *Cave* v. *Cave*, (1856) 8 D. M. & G. 131, considered and applied. *In re* ILLINGWORTH. BEVIR *v.* ARMSTRONG – – – – **Eve J. 297**

—— Portions — Disentailing deed subject to anterior estates and powers annexed thereto—Mortgages—Priorities – **647**
See SETTLEMENT. 3.

—— "Possibility on a possibility"—Equitable interests—Election – – – **450**
See SETTLEMENT. 2.

PRACTICE—*Costs—Counsel's Fees—Three Counsel—Scientific Evidence—Special Circumstances—Qualifying Fee of Witness not called—Taxation—Rules of the Supreme Court, Order* LXV., *rr.* 9, 27, *sub-rr.* 29, 38.

In an action, ultimately dismissed with costs, raising complicated questions of fact and law, involving at the trial the examination of varied scientific theories and investigations, and imposing a large amount of labour and heavy responsibility on those conducting it at the trial:—

Held, that there were such special circumstances in the case as to justify the allowance on taxation of three counsel to one set of defendants, and that it was not material to take into account the fact that their co-defendants, whose interests up to a certain point were the same, were represented by two counsel.

Each defendant is entitled to fight his own case, and is not to be deprived of the advantage of so doing by the fact that his co-defendants were also doing their duty by themselves in fighting their own battle.

PRACTICE—*continued.*

Where a personal view of the locus in quo was essential to enable a scientific witness to make his evidence of most value a proper qualifying fee was allowed, although he was not ultimately called as a witness. GREAT WESTERN RAILWAY COMPANY *v.* CARPALLA UNITED CHINA CLAY COMPANY, LIMITED (No. 2) **Eve J. 471**

PRE-EMPTION—Highway — Dedication — Presumption—Disused tramway—Railway company — Capacity to dedicate — Adjoining owner—Right of pre-emption
See HIGHWAY. **579**

PREFERENCE SHARES—Company—Winding-up — Surplus assets — Preference on repayment of capital – – **187**
See COMPANY. 2.

PREMIUM—Bankruptcy—Life policies—Payment of premiums from date of receiving order—Salvage—Interest – **492**
See BANKRUPTCY. 1.

PRESCRIPTION—Easement—Right of way—Presumption of lost grant—Inclosure of common land—Award of right of way—Non-user – – – – – **570**
See WAY, RIGHT OF.

PRESUMPTION—Easement—Right of way—Presumption of lost grant—Inclosure of common land—Award of right of way —Non-user – – – – **570**
See WAY, RIGHT OF.

—— Highway—Dedication—Strip of land running alongside highway — Disused tramway – – – – – **579**
See HIGHWAY.

PRINCIPAL AND SURETY — *Indemnity — Action quia timet—Present Debt—Joint and Several Guarantee of Overdraft at Bank—No Demand by Bank for Payment—Parties.*

Where there is an actual accrued debt secured by a guarantee and one of several co-sureties is liable, and admits liability for the amount guaranteed, he has a right in equity to compel the principal debtor to relieve him from his liability by paying off the debt.

This equitable relief is not limited to cases where the creditor has refused to sue the principal debtor.

Ranelaugh v. *Hayes*, (1683) 1 Vern. 189; *Nisbet* v. *Smith*, (1789) 2 Bro. C. C. 579; *Wooldridge* v. *Norris*, (1868) L. R. 6 Eq. 410; and *Mathews* v. *Saurin*, (1893) 31 L. R. Ir. 181, followed.

Suggested limitation in *Padwick* v. *Stanley*, (1852) 9 Hare, 627, not followed.

Dale & Perry v. *Lolley*, (1808) 2 Bro. C. C. 582, n., and *Hughes-Hallett* v. *Indian Mammoth Gold Mines Co.*, (1882) 22 Ch. D. 561, distinguished.

Semble, neither the creditor nor the co-sureties need be parties. ASCHERSON *v.* TREDEGAR DRY DOCK AND WHARF COMPANY, LIMITED **Swinfen Eady J. 401**

PRIORITY — Company — Winding-up — Parliamentary company — Distribution of assets — Preference shares — Deficiency of capital - - - - - **40**
See COMPANY. 6.

—— Settlement—Portions—Disentailing deed—Mortgages—Priorities - - - **647**
See SETTLEMENT. 3.

PROBATE—*Revocation—Mesne Acts of Executors—Specific Legacy—Bequest of Shares to A.—Assent of Executors——Transfer—Discovery of Codicil—Shares given to B.—Recovery of Shares—Mesne Income—Common Law Action.*

Specific shares bequeathed to A. were duly transferred to A. by the executors after probate and assent. Some years later a codicil was discovered revoking the bequest to A. and giving the shares to B., but not changing the executors. The original probate was revoked and a fresh probate, including the new codicil, granted to the same executors :—

Held, that the specific legacy having in fact been assented to, the legal title with the right to sue for the legacy at common law vested in B., the actual legatee at the testator's death, and he could therefore recover both the shares and the mesne income from A.

Saunders' Case, (1599) 5 Rep. 12 a, and *Graysbrook* v. *Fox*, (1565) 1 Plowd. 275, applied.

Gittins v. *Steele*, (1818) 1 Swans. 199 (a pecuniary legacy), and *Jervis* v. *Wolferstan*, (1874) L. R. 18 Eq. 18, 26 (a share of residue), distinguished. *In re* WEST. WEST *v.* ROBERTS **Swinfen Eady J. 180**

PROFIT — Trustee making profit out of trust — Sale of goods to business by trustees at a profit—Retention of profit - **241**
See WILL. 6.

PROLONGATION—Patent.
See under PATENT.

PROOF—Secured creditors—Separate securities —Lumping debts and securities - **492**
See BANKRUPTCY. 1.

PUBLIC HEALTH—Sewers—Premises without district — Connection made by local authority—Subsequent right to impose terms for continuance of connection
See SEWERS. **555**

—— Street — New street — By-laws — Footway forming principal access to cottages—Width and construction - - **265**
See LOCAL GOVERNMENT. 2.

PURCHASE—Husband and wife—Purchase of house — Joint tenancy — Purchase-money paid by husband—Advancement — Rebuttal — Decree of nullity of marriage - - - - - **639**
See HUSBAND AND WIFE.

"PURCHASE-MONEYS"—Brewery company—Debenture trust deed — Licensing Acts —Compensation - - - **609**
See BREWERY COMPANY.

PURCHASER—Vendor and.
See under VENDOR AND PURCHASER.

RAILWAY — *Accommodation Works — Level Crossing—Agricultural Land—Change of Condition—Easement—Alteration of User—Increase of Burden—Tennis Club—Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *s.* 68.

Where a level crossing has been made under s. 68 of the Railways Clauses Consolidation Act, 1845, to connect agricultural lands severed by a railway, the landowner's future user of the crossing is not restricted to the purposes (such as agricultural purposes) for which it was used at the time the railway was constructed ; but he is not entitled to use it so as substantially to increase the burden of the easement by altering or enlarging its character, nature, or extent, as enjoyed at that time.

Whether the change of user increases the burden is a question of fact in each case.

For many years after the time it was made, an agricultural level crossing was used for the occasional passage of sheep and cattle, the keys of the gates being borrowed from a neighbouring signalman, who kept the signals at danger till the animals had crossed.

The neighbourhood having changed its agricultural character, the landowner let a field to a tennis club, who climbed the gates and used the crossing daily in large numbers.

It was proved that owing to the large main line traffic and the shunting from an adjoining colliery siding this user was exceedingly dangerous to the club members, and would subject the railway to a greatly increased strain and burden in watching their line and managing their traffic so as to avoid accidents :—

Held, that this user was unlawful, and would, if necessary, be restrained by injunction.

Reg. v. *Brown*, (1867) L. R. 2 Q. B. 630 ; *Great Northern Ry. Co.* v. *M'Alister*, [1897] 1 I. R. 587 ; and *Great Western Ry. Co.* v. *Talbot*, [1902] 2 Ch. 759, applied.

United Land Co. v. *Great Eastern Ry. Co.*, (1875) L. R. 10 Ch. 586, and *Finch* v. *Great Western Ry. Co.*, (1879) 5 Ex. D. 254, distinguished. TAFF VALE RAILWAY COMPANY *v.* GORDON CANNING - **Swinfen Eady J. 48**

—— Highway — Dedication — Presumption — Strip of land running alongside highway—Disused tramway—Railway company—Capacity to dedicate - **579**
See HIGHWAY.

—— Light railways—Costs—Taxation—Chancery or parliamentary scale—Costs of obtaining Light Railway Order - **398**
See SOLICITOR. 2.

RATES—Water rate—Trade premises—Sanitary conveniences—" Domestic purposes "
See LONDON. **666**

RATES AND TAXES—Lessor's covenant to pay all present and future—Sub-letting at a profit—Increased assessment—Liability of lessor - - - - **602**
See LANDLORD AND TENANT.

REAL PROPERTY LIMITATION—Advowson in gross—Foreclosure – – 519
See MORTGAGE. 1.

RECEIVER—*Interference with Possession of Receiver—Injunction—Practice—Proceedings in other Courts—Jurisdiction—Receiver in Debenture-holders' Action—Goods in Possession of Company under Hire-purchase Agreement.*

The M. Company were proprietors of a theatre and were supplied by the E. Company with certain electric plant under a hire-purchase agreement. The M. Company made default in payment of an instalment, and the E. Company brought an action in the King's Bench Division against the M. Company for the whole amount of the purchase-money. Pending this action a debenture-holders' action was brought in the Chancery Division and a receiver appointed. He went into possession and for a time carried on the theatre, using for that purpose the electric plant. Subsequently the E. Company obtained judgment in their action. After this the receiver sold the theatre to a new company, who purchased part of the plant, and the rest was returned to the E. Company. The E. Company claimed rent from the receiver for the use of their plant while he was carrying on the theatre, but refused to bring in a claim in the debenture-holders' action, and threatened proceedings in the King's Bench Division. The receiver applied by summons for an order that the E. Company should bring in their claim in the debenture-holders' action within seven days and be restrained from taking any proceedings to enforce it :—

Held, that this was a dispute as to the conduct of an officer of the Court in respect of which the Court was entitled to claim exclusive jurisdiction, and that it would not allow its own officer to be sued in another Court in respect of acts done in discharge of his office. *In re* MAIDSTONE PALACE OF VARIETIES, LIMITED. BLAIR *v.* MAIDSTONE PALACE OF VARIETIES, LIMITED Neville J. 283

RECEIVING ORDER—Bankruptcy – – 492
See BANKRUPTCY. 1.

RECONSTRUCTION—Company.
See under COMPANY.

REDEMPTION—Mortgage.
See under MORTGAGE.

REDUCTION OF CAPITAL—Lost capital—Evidence of loss – – – – 552
See COMPANY. 4.

REGISTRATION—Dentists.
See under DENTISTS.

—— Trade mark.
See under TRADE MARK.

REMOTENESS — Appointment — Validity — "Possibility on a possibility"—Equitable interests—Election – – 450
See SETTLEMENT. 2

REPAIR—Private or occupation roads—Dedication as highway– – – – 361
See INCLOSURE ACT.

RESTRICTIVE COVENANT.
See under COVENANT.

RESULTING TRUST.
See under TRUST.

REVOCATION—Patent.
See under PATENT.

—— Probate.
See under PROBATE.

—— Will — Executors in England — Indian assets—Fraud in India—Revocation of Indian letters of administration—Title of executors – – – – 348
See ADMINISTRATION.

RIGHT OF WAY.
See under WAY, RIGHT OF.

RIVER—Diversion of water from river—Statutory powers – – – – 505
See CANAL COMPANY.

ROAD—Repair of private or occupation roads—Dedication as highway – – 361
See INCLOSURE ACT.

RUGBY WATER ACTS – – – – 505
See CANAL COMPANY.

RULES OF THE SUPREME COURT—Order LXV., rr. 9, 27; sub-rr. 29, 38 – 471
See PRACTICE.

SALE—Company—Winding-up—Sale to foreign company—"Company"—Meaning of 484
See COMPANY. 7.

—— "Trust or direction for sale"—Tenant for life – – – – – – 201
See SETTLED LAND.

—— Trustee making profit out of trust—Sale of goods to business by trustees at a profit—Retention of profit – – 241
See WILL. 6.

—— Vendor and purchaser.
See under VENDOR AND PURCHASER.

SCHOOL—Charitable trust—Society of Friends—Trust for "civil or religious purposes"—Uncertainty—Scheme – – 675
See CHARITY. 1.

SECURED CREDITORS—Separate securities 492
See BANKRUPTCY. 1.

SETTLED ESTATE.
See under SETTLED LAND.

SETTLED LAND—*"Trust or Direction for Sale"—Trust for Sale "only at the request of my wife"—Tenant for life—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 63—*Settled Land Act*, 1884 (47 & 48 *Vict. c.* 18), *ss.* 6, 7.

The fact that a trust for sale cannot be exercised without the consent of the tenant for life does not prevent its being a trust or direction for sale within the meaning of s. 63 of the Settled Land Act, 1882. *In re* WAGSTAFF'S SETTLED ESTATES– – – Neville J. 201

SETTLED LAND—*continued.*

—— Heirlooms—Trust of chattels as—Construction—Settled estates—To be enjoyed with mansion house—Tenant in tail—Vesting—Actual possession— - 329
See HEIRLOOMS.

—— Title—Sale by tenant for life—Incumbrance prior to settlement—Concurrence of trustees - - - - - 59
See VENDOR AND PURCHASER. 2.

—— Unauthorized securities—Wasting securities—No trust for conversion—Power to trustees to retain—Enjoyment of income in specie - - - - 111
See WILL. 5.

SETTLEMENT—*"Eldest Son" — Portions for younger Children resting at twenty-one—Period of Distribution postponed—Accelerating Period of Distribution—Younger Son afterwards becoming Eldest Son.*

A testator by his will settled real estates on his daughter for life with remainder to her first and other sons successively in tail male with remainders over, and with power for her, on her marriage, by deed to limit a life estate to her husband and to charge 6000*l.* on the estates as portions for her younger children, to be payable at such times or time and in such manner as she should by deed appoint, and in default of appointment to be divided equally amongst such younger children to become vested interests in sons at twenty-one and in daughters at twenty-one or marriage.

In 1845 the daughter married, and by her marriage settlement a life estate was given to the husband and a term of years was limited upon trusts, in the events which happened, after the death of the survivor of the husband and wife to raise the portions to vest in and be payable to younger sons at twenty-one and daughters at that age or marriage, but payment to be postponed until the death of the survivor of the husband and wife, unless the husband should signify in writing that the same should be sooner paid. There were three children, two sons and a daughter, all of whom attained twenty-one before 1882, when the mother died. In 1897 W., the younger son, mortgaged his portion (3000*l.*), the father joining in the mortgage deed to signify that the sum should be raisable immediately. In 1900 W., on the death of his elder brother without issue, became the eldest son, and in 1905, on the death of the father, succeeded to the estates as tenant in tail, and afterwards died without issue. The question then arose whether W.'s estate was entitled to have the 3000*l.* raised and paid:—

Held, that upon the construction of the will and settlement and in the events which happened the wife's power of appointment among younger children had not been exercised in favour of W. and that his estate was not entitled to the 3000*l.*

Decision of Neville J., [1909] 1 Ch. 534, reversed. *In re* STAWELL'S TRUSTS. POOLE *v.* RIVERSDALE - - - - - **C. A. 239**

2. —— *Real Property—Appointment—Validity—Remoteness—"Possibility on a possibility"—Equitable Interests—Election.*

SETTLEMENT—*continued.*

The old rule against double possibilities, namely, that after an estate has been limited to an unborn person for life a remainder cannot be limited to any child of such unborn person, applies to equitable interests as well as to legal remainders.

Monypenny v. *Dering*, (1852) 2 D. M. & G. 145, and *Whitting* v. *Whitting*, (1908) 53 Sol. J. 100, applied and followed.

Where a testamentary appointment, made in pursuance of a power in a settlement, has been held invalid on the ground that it was an infringement of the rule against double possibilities, the persons entitled in default of appointment, who take larger benefits under the will of the testator than under the settlement, will not be put to their election.

In re Oliver's Settlement, [1905] 1 Ch. 191, followed. *In re* NASH. COOK *v.* FREDERICK **Eve J. 450**

3. —— *Tenant for Life — Power to appoint Portions—Disentailing Deed subject to anterior Estates and Powers annexed thereto—Mortgages—Covenants for Title including Indemnity against Portions—Whether Power released—Subsequent Appointment of Portions—Priorities.*

Under a marriage settlement made in 1832 estates stood limited in 1854 to the use of A. for life, remainder to the use of trustees for a long term of years to secure 20,000*l.* as portions for A.'s younger children, with remainder to B. (A.'s eldest son) in tail male, with remainders over; and the settlement contained a power for A. by deed or will to appoint the further sum of 10,000*l.* as portions for his younger children. In 1854 B., with A.'s consent, executed a disentailing deed by which the estates were assured (subject to the uses and estates created by the settlement anterior to B.'s estate tail and to all powers to such precedent estates annexed) to such uses as A. and B. should by deed jointly appoint, and they in exercise of their joint power created mortgages on the estates, and in the mortgage deeds entered into the usual covenants for title, with an indemnity against all incumbrances, including "portions." In 1896 A. died, having by his will charged the estates with the further sum of 10,000*l.* as portions for his younger children. Subsequently questions arose as to the priorities of the mortgages created by the exercise of the joint power of appointment and the further portions of 10,000*l.* appointed by A.'s will:—

Held, that A.'s power to appoint portions was annexed to his life estate, and was not released by his concurrence in the disentailing deed.

Held, also, that A.'s covenants for title in the mortgages created under the joint power of appointment did not amount to a release by him of his power to appoint portions, and therefore that the portions appointed by his will had priority over the mortgages.

Scrope v. *Offley*, (1736) 1 Bro. P. C. 276, distinguished. NOTTIDGE *v.* DERING. RABAN *v.* DERING - - - - **Neville J. 647**

SEWERS—*Premises without District—Connection made by Local Authority—Subsequent Right to impose Terms for Continuance of Connection—*

SEWERS—*continued.*

New Water Closet—Internal Connection with existing Drain—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 21, 22.

Where a local authority for valuable consideration permit an owner of premises without their district to connect the drains of those premises with their sewers, or where they themselves make the connection, without imposing terms upon the owner under s. 22 of the Public Health Act, 1875, they cannot afterwards impose terms for the continuance of that connection.

Attorney-General v. *Clerkenwell Vestry*, [1891] 3 Ch. 527, and *Brown* v. *Dunstable Corporation*, [1899] 2 Ch. 378, applied.

A residential property, of which the dwelling-house was without the district of the plaintiff authority, but the lodge was within the district, had a system of drainage whereby the drainage from the house went into a cesspool with an overflow drain leading to a pond, the cesspool and pond both being within the plaintiffs' district, and the drainage from the lodge joined the overflow drain before it reached the pond. The pond having become a nuisance, the owner, at the instance of the plaintiffs, connected the overflow drain by a 9-inch pipe direct with a storm-water drain in the plaintiffs' district. The plaintiffs, without consulting the owner, subsequently connected the storm-water drain with a soil sewer, and ultimately connected the 9-inch pipe direct with the sewer. The defendant having bought the property, the plaintiffs required him to agree terms under s. 22 of the Public Health Act, 1875, for the continuance of this connection or provide other means for the disposal of his sewage, and claimed an injunction to restrain him from permitting the drainage of that part of his property which was without their district to discharge into their sewers until terms were settled :—

Held that, the connection having been already made, s. 22 no longer applied, and that the plaintiffs' claim failed.

Per Cozens-Hardy M.R. and Farwell L.J.: *Semble*, inasmuch as the cesspool was within the district, the sewage in question was not foreign sewage and the owner was entitled to connect with the plaintiffs' sewers under s. 21.

Per Swinfen Eady J.: The internal connection of a new water closet with an existing drain is not a new connection with the sewer within s. 22.

Dictum of Byrne J. in *Graham* v. *Wroughton*, [1901] 2 Ch. 451, 454, not followed. EAST BARNET VALLEY URBAN DISTRICT COUNCIL *v.* STALLARD - - - - - **C. A. 555**

SHAREHOLDERS AND SHARES—Company.
See under COMPANY.

SHIP—Bankruptcy—Proof—Shares in ships—Vendor's lien - - - - **492**
See BANKRUPTCY. 1.

SOCIETY OF FRIENDS.
See under FRIENDS, SOCIETY OF.

SOLICITOR—*Bill of Costs—Taxation—Application by Client to tax within One Month after delivery of Bill—Common Order to tax—Submission to pay—Items barred by Statute of Limitations—Solicitors Act*, 1843 (6 & 7 *Vict. c.* 73), *s.* 37.

On an application within one month of delivery of a bill of costs the client has an absolute right to have the bill taxed without any money being brought into Court and without any submission to pay. After the expiration of one month there is no such absolute right, but a submission to pay is not in any case a necessary part of a common order to tax. If a submission is inserted, it should be a submission to pay not what is due, but what is payable having regard (inter alia) to the defence of the Statute of Limitations, and questions arising under that Act should be dealt with by the taxing Master.

In any case in which the client seeks an order for delivery of papers the order should direct taxation also of the statute-barred items, so as to ascertain the amount for which the solicitor has a lien upon the papers.

Common form of order altered accordingly.

Decision of Warrington J., [1909] 1 Ch. 354, reversed. *In re* BROCKMAN - - **C. A. 170**

2. —— *Costs—Taxation—Chancery or Parliamentary Scale—Costs of obtaining Light Railway Order—Light Railways Act*, 1896 (59 & 60 *Vict. c.* 48), *ss.* 2, 7, 10.

The costs of obtaining an order under the Light Railways Act, 1896, are taxable on the Chancery and not on the parliamentary scale.

In re Morley, (1875) L. R. 20 Eq. 17, applied. *In re* PETERSON - - **C. A. 398**

—— Misappropriation by solicitor—Limitations, Statute of—Acknowledgment—Entry of deceased person against interest **382**
See TRUSTEE.

SPECIFIC LEGACY—Bequest of shares to A.—Assent of executors—Transfer—Discovery of codicil—Shares given to B.—Recovery of shares - - - **180**
See PROBATE.

SPECIFIC PERFORMANCE—*Injunction—Contract for purchase of Timber to be cut and removed by Purchaser—Mutuality—Licence—Revocation.*

The plaintiffs entered into a contract with the defendant for the purchase of certain timber growing on his property. By the contract they were to have the right to enter upon the property, cut the timber, and saw it up thereon, to erect sawmills, and to remove the timber; and the defendant was to give free exit for all timber to hard roads and free sites for sawmills. The plaintiffs erected a sawmill and commenced to cut timber, saw it up, and remove it. The defendant subsequently repudiated the contract and forcibly ousted the plaintiffs and their men from the estate. The plaintiffs brought this action against the defendant, asking for an injunction restraining him from preventing the due execution of the contract, and for damages. The defendant contended, inter alia, that the claim for an injunction was equivalent to a claim for specific performance, and that the

SPECIFIC PERFORMANCE—*continued.*

Court would not grant specific performance of such a contract, but would leave the plaintiffs to their remedy by way of damages :—

Held, that although the Court might be unable to compel the plaintiffs to cut the timber if they refused to do so, it had jurisdiction to give them relief by way of specific performance, and that the injunction ought to be granted. JAMES JONES & SONS, LIMITED *v.* EARL OF TANKERVILLE – – – **Parker J. 440**

STALE DEMAND — Mortgage — Foreclosure — Advowson in gross—Equitable mortgage—"Land" – – – – **519**
See MORTGAGE. 1.

STATUTES:—

I. IMPERIAL STATUTES.

1810.

50 Geo. 3, c. 122—*Union and Grand Junction Canal* – – – – – **505**
See CANAL COMPANY.

1817.

57 Geo. 3, c. xxix., s. 80—*Michael Angelo Taylor's Act* – – – – – – **287**
See LOCAL GOVERNMENT. 1.

1832.

2 & 3 Will. 4, c. 71, s. 2—*Prescription* – **570**
See WAY, RIGHT OF.

1833.

3 & 4 Will. 4, c. 27, s. 1—*Real Property Limitation* – – – – – – **519**
See MORTGAGE. 1.

1835.

5 & 6 Will. 4, c. 50, s. 23—*Highway* – – **361**
See INCLOSURE ACT.

1843.

6 & 7 Vict. c. 73, s. 37—*Solicitors* – – **170**
See SOLICITOR. 1.

1845.

8 & 9 Vict. c. 16, s. 120—*Companies Clauses Consolidation* – – – – **40**
See COMPANY. 6.

8 & 9 Vict. c. 20, s. 68—*Railways Clauses Consolidation* – – – – **48**
See RAILWAY.

8 & 9 Vict. c. 118, s. 68—*Inclosure* – – **361**
See INCLOSURE ACT.

1862.

25 & 26 Vict. c. 89, s. 133, sub-ss. 1, 10—*Companies* – – – – – **187**
See COMPANY. 2.

1863.

26 & 27 Vict. c. 93, s. 12—*Waterworks Clauses* **666**
See LONDON.

26 & 27 Vict. c. xxxiii.—*Rugby Waterworks* **505**
See CANAL COMPANY.

STATUTES—*continued.*

1871.

34 & 35 Vict. c. 31, s. 4, sub-s. 3 (*a*) ; s. 8—*Trade Union* – – – – – **148**
See TRADE UNION.

1875.

38 & 39 Vict. c. 55, ss. 4, 157—*Public Health* **265**
See LOCAL GOVERNMENT. 2.

—— —— ss. 21, 22 – – – – **555**
See SEWERS.

1877.

40 & 41 Vict. c. 26, s. 3—*Companies* – – **552**
See COMPANY. 4.

1878.

41 & 42 Vict. c. 33, s. 3—*Dentists* – **23, 524**
See DENTIST. 1, 2.

1882.

45 & 46 Vict. c. 38, s. 2, sub-s. 9 ; ss. 21, 22—*Settled Land* – – – – **59**
See VENDOR AND PURCHASER. 2.

—— —— s. 63 – – – – – – **201**
See SETTLED LAND.

45 & 46 Vict. c. 75, s. 1, sub-s. 1 ; s. 5—*Married Women's Property* – – – **206**
See ELECTION.

1883.

46 & 47 Vict. c. 52, ss. 44, 54—*Bankruptcy* **195**
See BANKRUPTCY. 2.

1884.

47 & 48 Vict. c. 18, ss. 6, 7—*Settled Land* – **201**
See SETTLED LAND.

47 & 48 Vict. c. ccxlix., ss. 3, 4, 5, 6, 28, 34, 36 56—*West Gloucestershire Water* – **338**
See COMPANY. 5.

1888.

51 & 52 Vict. c. 59, s. 8, sub-s. 1 (*a*), (*b*)—*Trustee* **382**
See TRUSTEE.

1889.

52 & 53 Vict. c. 49, s. 4—*Arbitration* – **121**
See ARBITRATION.

1890.

53 & 54 Vict. c. 39, s. 22—*Partnership* – **195**
See BANKRUPTCY. 2.

1892.

55 & 56 Vict. c. 27, s. 1, sub-ss. 1, 2, 3—*Parliamentary Deposits and Bonds* – **540**
See TRAMWAYS.

1893.

56 & 57 Vict. c. 39, ss. 10, 34, 58, 60 ; Sched. II., clauses 7, 9—*Industrial and Provident Societies* – – – – – **526**
See INDUSTRIAL AND PROVIDENT SOCIETY.

56 & 57 Vict. c. 53, ss. 30, 33—*Trustee* – **620**
See INFANT.

STATUTES—*continued.*

1896.

59 & 60 Vict. c. 48, ss. 2, 7, 10—*Light Railways* *See* SOLICITOR. 2. 398

1899.

62 & 63 Vict. c. clvii., ss. 4, 12—*West Gloucestershire Water* – – – – 338
See COMPANY. 5.

1901.

1 Edw. 7, c. cclxix.—*Rugby Water and Improvement* – – – – – 505
See CANAL COMPANY.

1904.

4 Edw. 7, c. 23, s. 2—*Licensing* – – 609
See BREWERY COMPANY.

1905.

5 Edw. 7, c. 15, s. 9, sub-s. 5—*Trade Marks* *See* TRADE MARK. 2, 3. 99, 373

—— —— ss. 11, 19 – – – – 10
See TRADE MARK. 1.

1907.

7 Edw. 7, c. 9, ss. 29, 34; Orders in Council of March 19 and April 9, 1908—*Territorial and Reserve Forces* – – – 410
See WILL. 7.

7 Edw. 7, c. 29, s. 18—*Patents and Designs* 447
See PATENT. 1.

—— —— ss. 24, 27 – – – 68, 217
See PATENT. 2, 3.

7 Edw. 7, c. clxxi., ss. 8, 9, 13, 16, 25—*Metropolitan Water Board (Charges)* – 666
See LONDON.

1908.

8 Edw. 7, c. 69—*Companies (Consolidation)* 187
See COMPANY. 2.

—— —— s. 46 – – – – – 552
See COMPANY. 4.

—— —— s. 89 – – – – – 658
See COMPANY. 3.

—— —— ss. 192, 285 – – – – 484
See COMPANY. 7.

II. INDIAN STATUTE.

1865.

Indian Succession Act, 1865 (Act X. of 1865), ss. 2, 3, 5, 179, 180, 187, 188, 190, 191, 234, 242, 243, 260, 262, 269, 278 – 348
See ADMINISTRATION.

STATUTORY COMPANY—Tramways.
See under TRAMWAYS.

STAYING PROCEEDINGS — Arbitration — Step in proceedings—Undertaking by defendants to furnish account – – 121
See ARBITRATION.

STOCKBROKER — Banker's lien—Authority to borrow—Pledge of client's security—Overdraft—Special borrowing – 226
See BANK.

STREET—By-laws—Footway forming principal access to cottages — Width and construction – – – – – 265
See LOCAL GOVERNMENT. 2.

—— Compulsory purchase—Street — Widening —Notice to treat—Withdrawal—Compensation – – – – – 287
See LOCAL GOVERNMENT. 1.

SURETY—Principal and.
See under PRINCIPAL AND SURETY.

SURPLUS ASSETS—Company — Winding-up—Preference shares – – – 187
See COMPANY. 2.

TAXATION—Solicitors' costs.
See under SOLICITOR.

TENANT—Landlord and.
See under LANDLORD AND TENANT.

TENANT FOR LIFE.
See under SETTLED LAND.

TENANT IN TAIL — Heirlooms — Trust of chattels as—Construction—To be enjoyed with mansion house — Vesting — Actual possession – – – 329
See HEIRLOOMS.

TENNIS CLUB—Level crossing—Easement—Alteration of user – – – 48
See RAILWAY.

TERRITORIAL AND RESERVE FORCES ACT, 1907—Will—Construction – – 410
See WILL. 7.

TIMBER—Injunction—Contract for purchase of timber to be cut and removed by purchaser—Mutuality – – – 440
See SPECIFIC PERFORMANCE.

TITLE—Vendor and purchaser.
See under VENDOR AND PURCHASER.

TRADE MARK—*Applicable to register—Similar Mark on Register—"Same goods or description of goods"—Calculated to deceive—Trade Marks Act*, 1905 (5 *Edw. 7, c.* 15), *ss.* 11, 19.

The opponents were manufacturers of all sorts of indiarubber goods, except boots and shoes. They had registered in 1899 a trade mark, of which the distinctive part was a Maltese cross, in class 40, for "goods manufactured from indiarubber or guttapercha not including dress shields or gussette webs." The applicants applied to register in class 38 two trade marks of which the distinctive feature was a Maltese cross, one for "boots and shoes made wholly or partly of indiarubber," the other for "indiarubber footwear included in this class but not including gaiters or leggings or any goods of a like kind." The applicants had used the marks in Canada on all kinds of indiarubber

TRADE MARK—*continued.*

goods. They had done some business in England, but only in boots and shoes :—

Held, that the opponents' trade mark was for "the same description of goods" as the applicants' proposed marks and they were "calculated to deceive," and registration ought to be refused under s. 19 and also under s. 11 of the Trade Marks Act, 1905. *In re* GUTTA PERCHA AND INDIA RUBBER COMPANY OF TORONTO'S APPLICATIONS - - - - **C. A. 10**

2. —— *Registration — Distinctive Mark — "Lawson Tait"—Adapted to distinguish—User —Trade Marks Act*, 1905 (5 *Edw. 7, c.* 15), *s.* 9, *par.* (5.).

By a written agreement made in 1898 between the predecessors of the applicants and L. T., it was agreed that L. T. should permit them to manufacture and sell a certain pattern of bedstead under the name of the L. T. bedstead, on payment of a royalty. The pattern of bedstead referred to was a bedstead constructed in three parts, and had been approved by L. T. in 1881, when he gave verbal permission for the use of his name upon these bedsteads. There was evidence that since 1881 the name of L. T. had been continuously applied to bedsteads constructed on the above principle by the applicants and their predecessors, and to nothing else, and that the bedsteads had become well known to the trade generally as the L. T. bedsteads. Upon an application, referred to the Court by the Board of Trade, for the registration of the words "Lawson Tait" as a trade mark in class 41 for bedsteads :—

Held, that the name "Lawson Tait" must be deemed to be a distinctive mark in respect of bedsteads of the pattern referred to in the agreement of 1898, within the meaning of s. 9, par. (5.), of the Trade Marks Act, 1905, and the registrar must be directed to proceed with the registration of it in respect of those bedsteads. *In re* WHITFIELDS BEDSTEADS, LIMITED, APPLICATION FOR REGISTRATION OF A TRADE MARK **Eve J. 373**

3. —— *Registration — Registrable Mark — "Distinctive" Mark—"Adapted to distinguish" —Geographical Name—Trade Marks Act*, 1905 (5 *Edw. 7, c.* 15), *s.* 9, *sub-s.* 5.

Application under s. 9, sub-s. 5, of the Trade Marks Act, 1905, for the registration of the words "California Syrup of Figs" in respect of a medicinal preparation of syrup of figs. The applicant company was an American company carrying on business at San Francisco, in California, with agencies in England. The evidence shewed that the applicant company introduced its preparation into this country some twelve or thirteen years ago and had since then continuously sold it here under the name of "California Syrup of Figs," and it was admitted that at the present time the words "California Syrup of Figs" distinguished the syrup of figs prepared by the applicant company from the syrup of figs prepared by other persons :—

Held, that the words "California Syrup of Figs" were not "adapted to distinguish" the applicant company's goods from those of other

TRADE MARK—*continued.*

persons and were not registrable as a trade mark under s. 9.

General observations as to the use of geographical names as trade marks.

In re National Starch Co.'s Application, [1908] 2 Ch. 698, and *In re Royal Worcester Corset Co.'s Application*, [1909] 1 Ch. 459, distinguished. *In re* CALIFORNIA FIG SYRUP COMPANY'S APPLICATION FOR THE REGISTRATION OF A TRADE MARK - **Warrington J. 99**

TRADE PREMISES — Water rate — Sanitary conveniences—"Domestic purposes" *See* LONDON. **666**

TRADE UNION — *Branch — Secession — Threatened Distribution of Funds—Ultra vires —Action by Head Trustees for Injunction and Payment over of Branch Funds — "Directly enforcing agreement"—Trade Union Act*, 1871 (34 & 35 *Vict. c.* 31), *s.* 4, *sub-s.* 3 (*a*) ; *s.* 8.

A resolution was passed by the members of a branch of a registered trade union that they would secede from the parent society and distribute the funds amongst the members of the branch. The rules of the society contained no provision as to the secession of branches. The trustees of the branch having declined to pay over the funds under their control to the head trustees, when required so to do, according to the rules, the head trustees brought an action against the trustees of the branch for a declaration that the resolution was ultra vires, an injunction, and payment to them of the funds of the branch :—

Held (Cozens-Hardy M.R. doubting), (1.) that the action, apart from the claim for payment, was not instituted with the object of directly enforcing an agreement for the application of the funds to provide benefits to members within the meaning of the Trade Union Act, 1871, s. 4, the object being to preserve the fund by preventing it from being misapplied without in any way administering it, and (2.) upon the construction of the rules, that the society had a sufficient interest in the property of the branch to maintain the action.

But *held*, that the Court had no jurisdiction to make any order for payment.

Decision of Eve J., [1908] 2 Ch. 624, affirmed. COPE *v.* CROSSINGHAM - - - **C. A. 148**

TRAMWAYS—*Statutory Company—Special Act — Tramways — Parliamentary Deposits — Time Limit for Completion of Works—Sale of Undertaking before Works completed—Successors in Title—Whether Undertaking "abandoned" by Company—Parliamentary Deposits and Bonds Act*, 1892 (55 & 56 *Vict. c.* 27), *s.* 1, *sub-s.* 1, 2, 3.

Sub-s. 1 of s. 1 of the Parliamentary Deposits and Bonds Act, 1892, which prescribes the manner in which moneys or securities paid or transferred into Court "to secure the completion by any company of any undertaking authorized by Parliament" shall be dealt with when "the undertaking has not been completed within the time limited in that behalf," means that the undertaking must be completed by the company within the time limit.

TRAMWAYS—*continued.*

Where, therefore, a statutory company, before all the works authorized by its special Acts had been completed, sold and conveyed its incomplete undertaking to another statutory body, who had statutory powers enabling them in effect to complete the undertaking:—

Held, that the undertaking had not been completed by the company within the meaning of sub-s. 1 of s. 1 of the Parliamentary Deposits and Bonds Act, 1892, and also that the company had "abandoned" its undertaking within the meaning of sub-s. 2 of that section.

Held, also, that the result of the conveyance by the company of its undertaking to the other statutory body was to put an immediate end to the time limited by the company's special Acts for the completion of its undertaking by the company. *In re* PECKHAM, DULWICH, AND CRYSTAL PALACE TRAMWAYS BILL
Neville J. 540

—— Highway — Dedication — Presumption — Strip of land running alongside highway—Disused tramway—Railway company - - - - - - 579
See HIGHWAY.

TRANSVAAL—Immovables—Contract relating to foreign land—Capacity to contract—Lex situs—Law of the Transvaal - 129
See CONFLICT OF LAWS.

TRUST—Charitable trust.
See under CHARITY.

—— Husband and wife—Purchase of house—Purchase-money paid by husband—Resulting trust—Advancement—Rebuttal—Decree of nullity of marriage - 639
See HUSBAND AND WIFE.

—— "Trust or direction for sale"—Tenant for life - - - - - - - 201
See SETTLED LAND.

TRUSTEE—*Innocent Breach of Trust—Misappropriation by Solicitor—Limitations, Statute of—Acknowledgment—Settled Fund—Payment of Interest to Tenant for Life—Admission of Existence of Trust Capital—Evidence—Accounts—Admissibility — Entry of Deceased Person against Interest—Trustee Act*, 1888 (51 & 52 *Vict. c.* 59), *s.* 8, *sub-s.* 1 (*a*), (*b*).

Two beneficiaries under a will, a mother and son, of whom the son was absolutely entitled to the corpus of certain trust funds subject to the mother's beneficial life interest therein, sought to render a trustee liable to make good to the trust estate certain sums come to his hands and not invested. The trustee employed C. or his firm as solicitors in the execution of the trusts of the will and had allowed the trust funds in question to remain under the control of C., who misappropriated them. The fraud was discovered on C.'s death shortly before the action. The funds sought to be recovered consisted of a

TRUSTEE—*continued.*

specific sum of 31,000*l.*, which had been misappropriated by C. more than six years before the commencement of the action, and certain uninvested balances extending over a period of ten years, as to which an account was asked. The trustee pleaded s. 8 of the Trustee Act, 1888, as a defence to the action as against the mother, in reply to which the mother pleaded an acknowledgment by the trustee by payment to her of interest on the capital sums sought to be recovered within six years of the commencement of the action. At the trial no evidence was tendered in support of this replication except the capital and income accounts of C.'s firm with the trustee, which shewed that interest on a portion of the 31,000*l.* and on the general balance of capital had been credited by the firm to the trustee:—

Held, first, that the accounts were not admissible as being entries by a dead man against interest, because the accounts were not the accounts of C., but of his firm, and also because they shewed only a payment of interest on debts due from the firm to the trustee, and not a payment of interest on a debt due from the trustee himself; secondly, that a payment of interest by a trustee of a settled fund to a tenant for life within the six years did not constitute an admission by the trustee of the existence of the trust capital which would enure for the benefit of the tenant for life, so as to take the case out of s. 8 of the Trustee Act, 1888.

Held, therefore, that as against the mother the defence of s. 8 of the Trustee Act, 1888, prevailed as to all moneys come to the trustee's hands and not invested more than six years before the commencement of the action.

The Court accordingly made an order on the trustee for payment to the trust estate of the 31,000*l.*, but declared that upon payment of the said sum the trustee would be entitled to receive the income thereof during the life of the mother, and directed an account as to the uninvested balances limited to six years before the commencement of the action. *In re* FOUNTAINE. *In re* DOWLER. FOUNTAINE *v.* LORD AMHERST
C. A. 382

—— Company—Debentures—Claim for interest by trustees as registered holders - 423
See COMPANY. 1.

—— Infant—Maintenance—Tenant in tail in remainder—Order sanctioning mortgage of real estate—Jurisdiction of Court
See INFANT. 620

—— Settled land—Sale to tenant for life—Incumbrance prior to settlement—Concurrence of trustees - - - 59
See VENDOR AND PURCHASER. 2.

—— Tenant for life and remainderman—Unauthorized securities—Wasting securities—No trust for conversion—Power to trustees to retain - - - 111
See WILL. 5.

TRUSTEE — *continued.*

—— Will—Trustee making profit out of trust—Necessary trust to carry on business—Sale of goods to business to be carried on at a profit—Retention of profit – 241
See WILL. 6.

TRUSTEE IN BANKRUPTCY
See under BANKRUPTCY.

ULTRA VIRES — Company — Incorporation — Commission — Underwriting agreement
See COMPANY. 3. 658

—— Trade union — Benefit — Restraint — Threatened restriction of benefit – 148
See TRADE UNION.

—— Waterworks—Statutory powers—Supply of water outside statutory limit—Injunction – – – – – – 338
See COMPANY. 5.

UNCERTAINTY—Charitable trust—Society of Friends—Annual Trust for Yearly Meeting for religious purposes, —scheme – 675
See CHARITY. 1.

UNDERWRITING AGREEMENT — Company — Reconstruction — Commission — Ultra vires – – – – – – 658
See COMPANY. 3.

UNDISCHARGED BANKRUPT.
See under BANKRUPTCY.

UNION AND GRAND JUNCTION CANAL ACT, 1810 – – – – – 505
See CANAL COMPANY.

UNION—Trade union.
See under TRADE UNION.

USER — Lease of wayleave—Terms of lease—Easement—Alteration of user – – – 48
See RAILWAY.

—— Easement—Presumption of lost grant—Presumption of common law—Assent of right of way—User of other road on servient tenement—Prescription
See WAY, RIGHT OF. 570

—— Trade mark – – – – – 373
See TRADE MARK.

VENDOR AND PURCHASER — *Restrictive Covenants—Building Scheme—Rights of Purchasers inter se—Benefit annexed to Land—Assigns.*

In order to establish the existence of a building scheme there must be reference to general rights and obligations extending over a defined area.

If on a sale of part of an estate the purchaser covenants with the vendor, his heirs and assigns, and does not buy the purchased property in a particular way, a subsequent purchaser from the same vendor of another part of the estate does not take the benefit of the covenant unless he is an express assignee thereof, or unless the covenant is expressed to be for the benefit and protection of the particular parcel purchased by the subsequent purchaser. The benefit of a covenant capable of being annexed to land, but not expressed to be so annexed, either by the deed containing the covenant or by some subsequent instrument executed by the covenantee, does not pass as an incident of land on a subsequent conveyance.

By a deed dated in 1840 the defendant's predecessor in title bought a piece of land, part of an estate comprising about sixty-four acres on the outskirts of Liverpool, which was vested in trustees for sale, and, for himself, his heirs and assigns, covenanted with the vendors, their heirs and assigns, to observe certain restrictions relating to building on the land purchased. The trustees subsequently sold other portions of the estate to the predecessors in title of the plaintiffs, who entered into similar restrictive covenants affecting the land purchased by them. There was nothing to shew whether the plaintiffs' predecessors were aware of the existence of the covenants of 1840, and there was no reference to them in their conveyances. The trustees at intervals before and after 1840 sold other plots of the estate to various purchasers who entered into varying covenants of a like nature, and eventually the whole estate was disposed of and became a residential quarter.

In an action by the plaintiffs to restrain the defendant from building in breach of the covenants contained in the deed of 1840 :—

Held by Joyce J., on the evidence, that there was sufficient to enable the Court to infer the existence of a general building scheme affecting the estate of the common vendors, and that the plaintiffs were entitled to an injunction.

Held by the Court of Appeal—(1.) that the plaintiffs had failed to establish the essential requisites of a building scheme, namely, definite reciprocal rights and obligations extending over a defined area; and (2.) that inasmuch as the benefit of the covenants in the deed of 1840 was not expressly assigned to the plaintiffs' predecessors in title so annexed to the land of which they were the assigns as to pass to mere conveyance, the plaintiffs were not entitled to succeed.

Decision of Joyce J. reversed. REID *v.* BICKERSTAFF – – – – C. A. 305

2. —— *Title—Sale by Tenant for Life—Incumbrance prior to Settlement—Purchase-money paid to Incumbrancer—Receipt for Purchase-money—Direction of Tenant for Life—Concurrence of Trustees—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-s.* 9; *ss.* 21, 22.

Where property sold by a tenant for life is subject to an incumbrance prior to the settlement, which exceeds the purchase-money in amount, and the whole of the purchase-money is intended to be applied in reduction of the incumbrance, the purchaser is not justified in paying his purchase-money direct to the incumbrancer by the direction of the tenant for life.

VENDOR AND PURCHASER—*continued.*

He cannot get a good discharge for his purchase-money except by paying it to or by the direction of the trustees of the settlement or into Court. The absence of such a discharge will prevent the purchaser making a good title upon a subsequent sale. *In re* NORTON AND LAS CASAS' CONTRACT – – – – **Neville J. 59**

—— Purchaser for value without notice — Will — Executors — Indian assets — Fraud in India—Revocation of Indian letters of administration – – **348**
See ADMINISTRATION.

—— Undischarged bankrupts — After-acquired property—Purchase of real estate as partners—Sale to a company—Intervention of trustees in bankruptcy **195**
See BANKRUPTCY. 2.

VESTING—Heirlooms—Trust of chattels as—Construction—To be enjoyed with mansion house — Tenant in tail—Actual possession – – – – – **329**
See HEIRLOOMS.

VOLUNTEERS, YEOMANRY, AND MILITIA—Will—Construction – – – **410**
See WILL. 7.

WARD OF COURT — *Marriage in Contempt—Committal of Ward—Jurisdiction.*

The Court has jurisdiction to commit a ward of Court to prison for contempt of Court, and will in a proper case exercise such jurisdiction.

Dictum of Cotton L.J. in *In re Leigh*, (1888) 40 Ch. D. 290, 294, applied. *In re* H.'s SETTLEMENT. H. *v.* H. – – **Warrington J. 260**

WASTING SECURITIES—Tenant for life and remainderman—Enjoyment of income in specie – – – – – **111**
See WILL. 5.

WATER—Canal company—Diversion of water from river—Statutory powers – **505**
See CANAL COMPANY.

—— Waterworks—Statutory powers — Supplying water outside statutory limits—Ultra vires—Injunction – – **338**
See COMPANY. 5.

WATER CLOSET — Sewers — Premises without district — Connection made by local authority — Subsequent right to impose terms for continuance of connection—New water closet – – – **555**
See SEWERS.

—— Water rate — Trade premises — Sanitary conveniences — "Domestic purposes" **666**
See LONDON.

WATER RATE—Trade premises—Sanitary conveniences—"Domestic purposes" **666**
See LONDON.

WATERWORKS.
See under WATER.

WAY, RIGHT OF—*Easement—Right of Way — Presumption of Lost Grant — Inclosure of Common Land—Award of Right of Way—Non-user—User of other Road on Servient Tenement—Living Memory—Claim by Prescription not available — Unity of Possession — Prescription Act*, 1832 (2 & 3 *Will.* 4, *c.* 71), *s.* 2—*Prescription at Common Law — Commencement of Easement.*

By an inclosure award in 1804 certain common lands were allotted to three adjoining owners, including the respective predecessors in title of the plaintiff Hulbert and of the defendant's lessor, and a private carriage road was awarded to the same persons leading from a certain named point to the defendant's farm. The awarded road was never used or even set out, and part of the homestead and outbuildings of the plaintiff's farm had stood for many years upon part of the admitted site of the awarded road. The evidence shewed that, until the commencement of the dispute giving rise to this action, the defendant and his predecessors in title or occupation had, for a period extending as far back as living memory went, openly and uninterruptedly used a private road running across part of the plaintiff's farm and in a direction parallel to the admitted course of the awarded road. There had been unity of possession of the plaintiff's and defendant's farms from 1889 to 1905. In an action by the plaintiff Hulbert and his tenant for an injunction to restrain the defendant from using the road in question :—

Held, that in the circumstances and on the evidence this was a case in which a lost grant of a right of way over the road in dispute ought to be presumed, and that consequently the action failed.

Decision of Joyce J. affirmed. HULBERT *v.* DALE – – – – – – **C. A. 570**

WEST GLOUCESTERSHIRE WATER ACTS.
See under WATER.

WIFE—Husband and.
See under HUSBAND AND WIFE.

WILL—*Absolute Trust for Conversion—Power to retain Investments made by Testator—Trustees unable to agree—Investment Clause—Companies "in the United Kingdom"—Companies registered in England but operating abroad—Will—Construction.*

Where a will contains a trust for conversion with a power to retain investments existing at the date of the will, and the trustees are not unanimous as to the retention of some of the investments made by the testator, the trust for sale prevails and the investments must be sold, although such investments are within the investment clause in the will.

A testator authorized his trustees to invest in the stocks, shares, or securities of "any company in the United Kingdom" :—

Held, that a limited company registered in

WILL—*continued.*

England and having its head office in England, where its directors met to manage the affairs of the company, was a "company in the United Kingdom" within the meaning of the investment clause, although its property was situate abroad and its operations were abroad. *In re* HILTON. GIBBES *v.* HALE-HILTON
Neville J. 548

2. —— *Forfeiture—"Deprived of the personal enjoyment of income or any part thereof"—Will—Construction.*

M. by will gave a fund to trustees upon trust to pay the income to F. "unless and until some event shall happen whereby if the same income belonged absolutely to her she would be deprived of the personal enjoyment thereof or of any part thereof." F. wrote to the acting trustee of the will, "I owe P. 260*l.* I have arranged to find her 100*l.* this week and I want you to pay direct to her the balance out of the next dividend due to me from the B. tea shares," part of the estate. Before the dividend became due F. paid off P. and withdrew the letter :—

Held, that there had been no forfeiture of her life interest. *In re* MAIR. WILLIAMSON *v.* FRENCH – – – – **Neville J. 280**

3. —— *Interest—Legacy payable at twenty-one—Power to Trustees to apply Legacy in or towards Benefit of Legatee whether under age of twenty-one or not—General Intention to provide Maintenance—Will—Construction—Legacy.*

Testatrix by her will devised and bequeathed the residue of her real and personal estate to trustees upon trust to sell and convert and out of the proceeds to pay certain pecuniary legacies, including a legacy of 200*l.* to her grand-nephew C. P., and she directed that the interest of males under her will should vest at twenty-one years and of females at that age or marriage. The testatrix empowered her trustees at their discretion "to apply the whole or any part of the share to which any beneficiary hereunder may be contingently entitled in or towards the advancement in life or otherwise for the benefit of such beneficiary whether male or female and whether under the age of twenty-one years or not." The testatrix died in 1908. At the date of her will and the date of her death C. P. was an infant :—

Held, that interest was payable on the legacy from the death of the testatrix and that the trustees were entitled to apply the interest in or towards the maintenance of C. P. during his infancy.

Pett v. *Fellows*, (1773) 1 Swans. 561, n., as explained by Sugden L.C. in *Leslie* v. *Leslie*, (1835) Ll. & G. t. Sugden, 1, 3 followed. *In re* CHURCHILL. HISCOCK *v.* LODDER
Warrington J. 431

4. —— *Issue "according to the parent stock," Gift to—Per stirpes—Children not taking concurrently with their Parents—Will—Construction.*

The testator gave his residuary estate to trustees upon trust on the death of the survivor of his wife and four daughters to divide the same unto, between, and amongst the issue then living of his said daughters in equal shares according to the parent stock and not the number of the individual objects, to the intent that the issue then living of any one of his said daughters might be entitled to a share equal to that which the issue (if any) of any other of them should be entitled to, and in case there should be issue then living of only one of them his said daughters, then the whole to be paid to or equally divided amongst such issue. At the death of the survivor of the testator's wife and daughters there were living children or issue of all the daughters :—

Held, that according to the plain and unambiguous words of the original gift there was a gift to the issue of the daughters per stirpes and not per capita, children not taking concurrently with their parents, and that the ambiguous words of the gift over in the particular event of there being issue living of only one of the daughters ought not to be allowed to affect the construction of the clear original gift. *In re* RAWLINSON. HILL *v.* WITHALL **Joyce J. 36**

5. —— *Tenant for Life and Remainderman—Unauthorized Securities—Wasting Securities—No Trust for Conversion—Power to Trustees to retain—Enjoyment of Income in Specie—Will—Construction.*

Where a will contains no trust for conversion and the tenant for life of the residue is given the entire income thereof, he is entitled to the income of the unauthorized securities retained by the trustees under a power of retainer whether the securities are of a permanent or of a wasting nature.

There is no distinction for the purposes of the application of the rule in *Howe* v. *Earl of Dartmouth*, (1802) 7 Ves. 137 a, between unauthorized securities of a wasting and those of a permanent nature.

Gray v. *Siggers*, (1880) 15 Ch. D. 74, followed.

Porter v. *Baddeley*, (1877) 5 Ch. D. 542, not followed. *In re* NICHOLSON. EADE *v.* NICHOLSON – – – **Warrington J. 111**

6. —— *Trustee and Cestui que Trust—Trustee making Profit out of Trust—Discretionary Trust to carry on Business—Licence to Trustee to exercise Powers under the Will notwithstanding Personal Interest—Sale of Goods to Business by Trustees at a Profit—Retention of Profit—Will—Construction.*

A testator carried on the business of a licensed victualler and also, in partnership with a brother, the business of a wine and spirit merchant, and in connection with his business of licensed victualler he purchased from the partnership business wines and spirits at prices below the market value of the goods. By his will he appointed his two brothers and his sister executors and trustees thereof and devised and bequeathed his residuary estate to his trustees upon trust to carry on his business of licensed victualler for a period not exceeding ten years from his death with all the powers in that behalf of absolute owners, and he declared that his trustees might exercise all powers and discretions thereby or by law given to them notwithstanding that

WILL—*continued.*

they or any of them might have a personal interest in the mode or result of exercising such power or discretion.

The trustees carried on the testator's business of a licensed victualler under the terms of the will, and the wine and spirit business was continued by the two brothers, who supplied the testator's licensed houses with wines and spirits at a profit but at less than current market prices :—

Held, that the brothers were entitled to retain the profit arising from such supply by virtue of the special clause at the end of the will, but not upon the ground stated in *Smith* v. *Langford*, (1840) 2 Beav. 362.

Per Cozens-Hardy M.R. : *Smith* v. *Langford* can no longer be treated as a binding authority. *In re* SYKES. SYKES *v.* SYKES - - **C. A. 241**

7. —— *Volunteers, Yeomanry, and Militia, Gifts to—Transfers of Volunteer and Yeomanry Units to Territorial Force and Militia Units to Army Reserve—"Existing Institutions"—Payment to County Associations—Gift to Commanding Officer of Militia Unit "for the mess of the regiment or for the poor of the regiment" — Charitable Gift — Territorial and Reserve Forces Act*, 1907 (7 *Edw.* 7, *c.* 9), *ss.* 29, 34—*Orders in Council of March* 19 *and April* 9, 1908.

Testator by his will, dated in 1893, devised and bequeathed the residue of his estate to trustees upon trust for sale, and out of the proceeds to pay legacies of 50*l.* each "to the officers commanding the Volunteer Rifles at Bournemouth, the Volunteer Artillery at Bournemouth, and the Volunteer Rifles at Weymouth, for the use of their respective corps," and a legacy of 100*l.* "to the officer commanding the Northamptonshire Militia for the mess of that regiment or for the poor of the regiment." By a first codicil the testator directed his trustee to divide the residue into eight parts and to accumulate three of such parts for seven years from his decease, and then to divide the accumulated fund "rateably among the persons and institutions to whom and to which I have given pecuniary legacies (and the foregoing five-eighth shares of residue by this codicil to my will), or such of them as shall be alive and existing in proportion to their respective shares of residue. . . . . In the event, however, of any such legatee dying or any such institution ceasing to exist prior to the expiration of such seven years, the share to which he or it would have been entitled shall go to my next of kin." By an eighth codicil the testator bequeathed "to the officer commanding the 1st Battalion Lanarkshire Volunteers the sum of 1000*l.* and to the officers commanding the Dorsetshire Yeomanry Cavalry and the London Scottish Volunteers respectively the sum of 500*l.* each" ; and he declared that the aforesaid respective sums should be held by the commanding officers "for any purpose or purposes for the benefit of their respective corps it being my intention that the said funds shall be deemed private funds and be held and expended entirely independently of Government control." The testator died in January, 1902, and in

WILL—*continued.*

January, 1909, the seven years limited by his will for accumulation expired and the fund became distributable. In the interval the Territorial and Reserve Forces Act, 1907, was passed, which, by s. 29 and an Order in Council of March 19, 1908, made thereunder, transferred the Volunteer and Yeomanry units to the Territorial Force, and by s. 34 and an Order in Council of April 9, 1908, transferred the Militia units to the Army Reserve :—

Held, that the effect of the Act and the Orders in Council was not to destroy the Volunteer, Yeomanry, and Militia units, but to reorganize them, and accordingly that those units had not ceased to exist.

Held, therefore, that the legacies bequeathed to the Volunteer and Yeomanry units were payable to the several county associations established under the Act on behalf of the units of the Territorial Force which now represented those units.

Held, also, that the legacy "to the officer commanding the Northamptonshire Militia for the mess of that regiment or for the poor of the regiment" was a good charitable gift, and was payable to the officer commanding the unit of the Army Reserve which now represented the Northamptonshire Militia.

In re Good, [1905] 2 Ch. 60, followed. *In re* DONALD. MOORE *v.* SOMERSET **Warrington J. 410**

—— Annuity—Charge on income or capital—Absolute gift of corpus "subject to the aforesaid annuities" - - - **19**
See ANNUITY.

—— Charity—Proposed scheme for Institute of Medical Sciences—Cyprès—Failure of legacy - - - - - - **1**
See CHARITY. 2.

—— Election—Bequest by married woman of husband's property to a third person
See ELECTION. **206**

—— Executors in England—Indian assets—Fraud in India—Revocation of Indian letters of administration—Title of executors - - - - - **348**
See ADMINISTRATION.

—— Specific legacy—Bequest of shares to A.—Assent of executors — Transfer — Discovery of codicil—Shares given to B.—Recovery of shares - - - **180**
See PROBATE.

WINDING-UP—Company.
See under COMPANY.

—— Industrial and provident society.
See under INDUSTRIAL AND PROVIDENT SOCIETY.

WORDS—"Abandoned" - - - **540**
See TRAMWAYS.

—— "Capital moneys" - - - - **609**
See BREWERY COMPANY.

WORDS—*continued.*

—— "Civil or religious purposes," Trust for *See* CHARITY. 1. 675

—— "Company" - - - - - 484
See COMPANY. 7.

—— "Dentist" - - - - - 524
See DENTIST. 1.

—— "Eldest son" - - - - 239
See SETTLEMENT. 1.

—— "Land" - - - - - 519
See MORTGAGE. 1.

WORDS—*continued.*

—— "Purchase-money" - - - 609
See BREWERY COMPANY.

—— "Water rate" - - - - 666
See LONDON.

YEOMANRY, VOLUNTEERS, AND MILITIA—
Will—Construction - - - 410
See WILL. 7.

BIBL.
LONDIN.
UNIV.

BRADBURY, AGNEW & CO. LD., PRINTERS, LONDON AND TONBRIDGE.